TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1077.~~ ~~530~~ ~~422~~ 124

ALFRED MARCHAND, PLAINTIFF IN ERROR,

vs.

JOSEPHINE ADELE LIVAUDAIS, WIFE OF CHARLES LAFITTE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 29, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 10, 1888.

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

ALFRED MARCHAND, Plaintiff in Error,
vs.
Mrs. CHARLES LAFITTE, Defendant in Error. } No. 11482.

W. S. Benedict and H'y Renshaw, Esquires, for plaintiff in error; Farrar & Kruttschnitt, Esquires, for defendant in error.

Writ of error returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the second Monday of October, A. D. 1887.

Transcript of Record.

1 Circuit Court of the United States, Eastern District of Louisiana.

ALFRED MARCHAND
vs.
Mrs. CHAS. LAFITTE. } No. 11482.

Petition. Filed Nov. 23, 1886.

To the honorable the circuit court of the United States for the district of Louisiana:

The petition of Alfred Marchand, a citizen of the Republic of France, residing at Paris, France, respectfully represents—

That Josephine Adele Livaudais, wife of Charles Lafitte, a citizen of the State of Louisiana, residing in this parish, is justly and truly indebted unto your petitioner in the full sum of five thousand dollars, with interest, costs, etc., for this, to wit:

That at New Orleans, on the 15th day of January, 1868, said defendant, duly authorized by her husband, made her note for the sum of five thousand dollars, at one year, to her own order, and by her endorsed, with interest at the rate of eight per cent. per annum from maturity until paid.

2 That to secure the payment of same, with interest and attorneys' fees, fixed at five per cent., she did by act before P. C. Cuvillier, notary, on said date of 15th of January, 1868, under authority of the judge of the second district court for the parish of Orleans, specially mortgage in favor of any holder of said note certain real estate situate in the parish of Orleans, fully described in said act.

Petitioner futher represents that thereafter, on the 30th day of October, 1879, said defendant made her certain promissory note of of said date, payable on the 15th day of January, 1881, for said sum of five thousand dollars, with interest at eight per cent. per annum from maturity, and secured the same by special mortgage on the same property described in the act before said P. C. Cuvillier, notary,

hereinbefore set forth, and same was secured by said mortgage, by act before James Fahey, notary, on said 30th October, 1879, for the purpose of securing an extension of time for the payment of the note herein firstly described, and in order to furnish a note negotiable in form, without in any manner novating the first note, bearing date January 15th, 1868, which it was agreed was to remain in full force and effect, together with the mortgage securing the same.

Petitioner further represents that on the payment of either of said notes the other was to be considered null and void.

Your petitioner does now represent that neither of the said notes has been paid; that there remains due and owing to your peti-
3 tioner thereon the said sum of five thousand dollars, with eight per cent. per annum interest thereon from August 25th, 1885, until paid, together with five per cent. attorneys' fees on said principal and interest, and that said two notes, with copy of said two acts of mortgage, are hereto annexed as part hereof, amicable demand having been made for the payment thereof, said defendant refusing to pay the same, thereby rendering necessary an action at law to enforce the rights of petitioner.

Wherefore petitioner prays that said Mrs. Josephine A. Livaudais, wife of Charles Lafitte, and her husband, to authorize her, be cited to appear and answer this petition, and after due proceedings there be judgment in favor of your petitioner and against said defendant for the said sum of five thousand dollars, with eight per cent. per annum interest from August 25th, 1885, until paid, five per cent. attorneys' fees thereon, and costs of suits, with the reservation of all the rights and actions in equity to your petitioner in and to the special mortgages set forth in said acts before said P. C. Cuvillier, notary, of date 15th January, 1868, and of said James Fahey, notary, of date 30th October, 1879, and he prays for all general and equitable relief in the premises.

(Signed) W. S. BENEDICT AND
H'Y RENSHAW, *Att'ys.*

Note. Filed with Petition Nov. 23, 1886.

4 $5,000. NEW ORLEANS, 15*th January*, 1868.

On the first of January next, after date, I promise to pay to the order of myself five thousand $\frac{00}{100}$ dollars, value received, with interest at the rate of eight per cent. per annum from maturity until paid.

J. A. LAFITTE.

I authorize my wife to sign and endorse.

CHS. LAFITTE.

Inscribed on face of note:
Ne varietur, as per act of mortgage duly stamped.
New Orleans, January 15th, 1868.

P. CHS. CUVILLIER, *Not. Pub.*

"*Ne varietur*," for identification with an act passed this day in this office.

New Orleans, 30th October, 1879.

JAS. FAHEY, *Not. Pub.*

Endorsed: J. A. Lafitte.

By consent the payment of this note is extended for one year from date without novation.

New Orleans, 3 January, 1874.

J. A. LAFITTE.

Note. Filed with Petition Nov. 23, 1886.

5 $5,000. NEW ORLEANS, LA., 30*th October*, 1879.

On the 15th January, 1881, after date, I promise to pay to the order of myself, at the Mutual National Bank, in this city, the sum of five thousand $\frac{00}{100}$ dollars, value received, with interest at eight per cent. per annum from maturity until paid.

J. A. LAFITTE.

I hereby authorize my wife to sign and endorse this note.

CHS. LAFITTE.

Inscribed on face of note: "*Ne varietur*," for identification with an act passed this day in this office.

New Orleans, 30th October, 1879.

JAS. FAHEY, *Not. Pub.*

Endorsed on back of note in ink: J. A. Lafitte.

Received four hundred dollars for interest to Jan'y 15–18, 1882.
Feb'y 9, '81.

P. FOURCHY, *Pr.*

Received on ac. of interest one hundred and twenty-five dollars.
Jan'y 23, '82.

P. FOURCHY, *Pr.*

Received on ac. of int. one hundred and twenty-five dollars.
April 3, '82.

P. FOURCHY, *Pr.*

Received one hundred and fifty dollars for bal. interest to Jan'y 18, '83.
March 11, '83.

P. FOURCHY, *Pr.*

Endorsed on back of note in pencil:

Mortgage reinscribed Dec. 21st, 1877 (property 59 x 180 feet.)

NEW ORLEANS.

Received at sundry times as follows:

Sept. 4, '84	$500
Nov. 17, '84	200
Jan'y 19, '85	168 32
April 22, '85	175 35
Total	$1,043 67

6 *Act of Mortgage. Filed with Petition Nov.* 23, 1886.

STATE OF LOUISIANA, *City of New Orleans:*

Mortgage. Mrs. J. A. Lafitte to P. Bienvenu. 15th January, 1868.

Reinscribed from Book 167, f. 86, to Book 328, f. 349.
Mortgage office, New Orleans, Nov. 19, 1886.
[SEAL.] JAMES KIRKPATRICK,
GEO. GUINAULT, *D. R.*

(Stamp.) (Stamp.) (Stamp.)

Before me, Pierre Charles Cuvillier, a notary public, duly commissioned and sworn, for the parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Mrs. Josephine Adele Livaudais, of lawful age, the wife of Charles Lafitte, of this city, by her husband, here present, duly assisted and authorized, and also hereto specially authorized according to law by the judge of the second district court of New Orleans, as per certificate of said judge, dated the ninth day of January instant (1868), and annexed in the margin hereof,

7 who declared and acknowledged that she is justly and truly indebted unto Placide Bienvenu, of this city, in the full amount and sum of fifteen thousand dollars, lawful money, by the said Placide Bienvenu to the said appearer, for her separate benefit and advantage loaned and advanced, the receipt whereof is hereby acknowledged, and for the reimbursement of which the said Mrs Lafitte, with the authorization of her husband, has made and subscribed three several promissory notes, dates this day, to the order of and endorsed by herself, for the sum of five thousand dollars each all payable on the first day of January next (1869), and to bear interest from maturity, if not then paid, at the rate of eight per cent per annum, until final payment; which notes, after being marked *ne varietur* by me, notary, for identity herewith, were handed over to the said P. Bienvenu, here present and acknowledging due receipt hereof.

And in case it shall become necessary to institute legal proceedings for the recovery of the amount of the said notes or of any part thereof the said Mrs. Lafitte binds herself to pay the fees of the attorney-at-law who may be employed for that purpose, which fees are hereby fixed at five per cent. on the amount sued for.

Now, therefore, in order to secure the punctual payment of the

said notes at maturity, together with all eventual interest and attorney's fees, the said Mrs. Lafitte declared that she does by these presents mortgage, effect, and specially hypothecate in favor
8 of the said P. Bienvenu, and to enure to the use and benefit of any and all future holder or holders of the said notes, the said P. Bienvenu being here present and accepting for himself or others, the following described property, to wit:

A lot of ground, with all the buildings and improvements thereon, situate in the second district of this city, in the square bounded by Rampart, Burgundy, Ursulines, and St. Philip streets, and measuring fifty-nine feet front on Rampart street by one hundred and eighty feet deep, all French measure (or in American measure, sixty-two feet ten inches and four lines front by one hundred and ninety-one feet ten inches deep), being the same property which the said Mrs. Lafitte acquired by purchase from Mrs. Elmire M. Charpantier by act passed before me, the undersigned notary, on the nineteenth day of October last past (1867), registered in the conveyance office in this city, in Book 92, folio 674. By reference to the hereunto-annexed certificate of the recorder of mortgages for this parish it appears that the only encumbrance existing on said property is a mortgage originally for $10,666.66⅔ granted by the above-named Mrs. Charpantier in favor of A. A. E. Quertier and others, by act passed in this office, on the fifth of November, 1866, which mortgage is now reduced to five thousand three hundred and thirty-three dollars and thirty-three and one-third cents, being the amount of six promissory notes, payable at two years from their date, which the said Mrs. Lafitte, by her act of purchase aforesaid, has assumed to pay, with the interest to accrue thereon, to wit: One for sixteen hundred dollars; one for one thousand and sixty-six dollars
9 and sixty-six ⅔ cents; one for eight hundred and fifty-three dollars and thirty-three ⅓ cents; one for the sum of seven hundred and forty-six dollars and sixty-six ⅔ cents, and two being each for the sum of five hundred and thirty-three dollars and thirty-three ⅓ cents, all dated 27th October, 1866, and made by the said Mrs. Charpantier to the order of and endorsed by herself.

And here personally intervened Alphonse Baudèau, of this city, holder and owner of these last six promissory notes, who declared that he does hereby give preference and priority over the mortgage securing the same to the mortgage created by this act to secure the aforesaid loan of fifteen thousand dollars; and accordingly I, the said notary, have mentioned this priority of mortgage on the said notes held by said Baudèau.

As regards the three promissory notes furnished by this act it is hereby agreed between the parties that the present act shall bear confession of judgment in favor of any holder or holders of the said notes until final payment, the said Mrs. Lafitte hereby binding herself and her heirs not to sell, alienate, nor encumber the said property to the prejudice of this act.

And the said mortgagor further declared that in the event of the said promissory note not being punctually paid at maturity it shall be lawful for, and she does hereby authorize the said mortgagee or

any holder or holders thereof to cause all and singular the property described and herein mortgaged to be seized and sold under executory process issued by any competent court, without appraisement, to the highest bidder, payable in cash, the said mortgagor hereby expressly dispensing with all and any appraisement thereof, and by these presents waiving and renouncing the benefit of appraisement and of all laws or parts of laws relative to appraisement of property seized and sold under executory or other legal process.

And the said mortgagor moreover binds herself to keep the buildings on said property constantly insured against loss by fire to an amount not less than —, and to transfer the policies of insurance to the said mortgagee until the full and final payment of the said notes, hereby consenting and agreeing that the said mortgagee shall have the right to transfer such policies to any future holder or holders of the said notes, and that in case of failure of the said mortgagor to effect such insurance the holder or holders of the said notes shall have the right to do so, and the reimbursement of all sums paid for that purpose shall be secured by the present mortgage, but this clause shall not be construed as obligatory on such holder or holders or as making them liable for any loss, damage, or injury which may result from the non-insurance of the said buildings.

The said mortgagor declares that she has been discharged from the tutorship which she exercised over her children, the issue of her former marriage with Hyppolite Griffon, as will appear by proceedings had in the second district court of this city in the matter of the succession of said late Hyppolite Griffon, and further declares that she is not tutrix to any other minor.

United States internal revenue stamps of the value of fifteen dollars are affixed hereon and cancelled.

Thus done and passed in my office, at the city of New Orleans aforesaid, in the presence of Adolph Blache and Theodore P. Ingraham, competent witnesses, who have hereunto subscribed their names with the said parties and me, notary, on this fifteenth day of January, in the year one thousand eight hundred and sixty-eight.

(Original signed) J. A. LAFITTE.
CHS. LAFITTE.
R. BAUDEAU.
P. BIENVENU.
A. BLACHE.
T. P. INGRAHAM.
P. CHS. CUVILLIER, *Not. Pub.*

I, the undersigned, custodian of notarial records for the parish of Orleans, State of Louisiana, hereby certify the foregoing to be a true copy of the original act passed before P. Chs. Cuvillier, notary public, deceased, dated 15th January, 1868, which said original act is now in my possession as custodian aforesaid.

New Orleans, Oct. 27th, 1879.

[SEAL.] (Signed) J. F. COFFEY,
Custodian of Notarial Records.

12 Be it known that on this ninth day of January, 1868, one thousand eight hundred and sixty-eight, before me, John W. Thomas, judge of the second district court of New Orleans, personally came and appeared Mrs. Livaudais, wife of Charles Lafitte, who, out of the presence of her said husband, declared to me that she desires to borrow a sum of fifteen thousand dollars ($15,000), and to grant a special mortgage on her separate property to secure said loan of fifteen thousand dollars, with all interest and costs, and she, said Mrs. Lafitte, having been by me examined touching the object for which the money is about to be borrowed, and she, said lady, having satisfied me that the money about to be borrowed is solely for her separate advantage and benefit, I do now furnish this certificate of the above facts pursuant to law. R. Statutes, p. 560 and 561; La., 2 and 3.

N. O., January 9th, 1868.

(Signed) J. W. THOMAS, *Judge.*

I, the undersigned, custodian of notarial records for the parish of Orleans, State of Louisiana, hereby certify the foregoing to be a true copy of the original annexed to an act of mortgage passed before P. C. Cuvillier, notary public, deceased, dated 15th January, 1868; which said act is now in my possession as custodian of notarial records aforesaid.

New Orleans, Oct. 27th, 1879.

[SEAL.] (Signed) J. F. COFFEY,
Custodian of Notarial Records.

13 *Acknowledgment of Indebtedness by Mrs. Josephine A. Lafitte to Paul Fourchy, &c. Filed with Petition Nov.* 23, 1886.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

(Stamp.) (Stamp.) (Stamp.)

Be it known that on this thirtieth day of October, in the year of our Lord eighteen hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth, before me, James Fahey, a notary public in and for the city of New Orleans and the parish of Orleans, in the State of Louisiana aforesaid, duly commissioned and sworn, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared Mrs. Josephine Adele Livaudais, the wife, of lawful age, of Charles Lafitte, with whom she resides in this city, and by her said husband, here present with her, duly assisted and authorized, who declared and acknowledged that she is justly and truly indebted on a certain note drawn by her, with the authorization of her said husband, to her own order and by herself endorsed, dated the fifteenth January,
1868, for the sum of five thousand dollars, payable on the
14 first of January, 1869, and bearing eight per cent. interest per annum from maturity until paid, paraphed "*ne varie-*

tur" by Pierre Charles Cuvillier, late a notary public in this city, for identification with and being one of the three notes secured by the mortgage granted by said Mrs. Josephine Adele Lafitte in favor of Placide Bienvenu, by act passed before said Cuvillier, notary, on the said 15th January, 1868, recorded in the mortgage office of this parish, in Book 85, fo. 406, on the 16th January, 1868, and reinscribed in said mortgage office, in Book 167, fo. 86, on the 21st December, 1877, and bearing on and affecting the following-described property, viz:

A lot of ground, with all the buildings and improvements thereon, situated in the second district of this city, in the square bounded by Rampart, Burgundy, Ursulines, and St. Philip streets, and measuring fifty-nine feet front on Rampart street by one hundred and eighty feet deep, all French measure (or, in American measure, sixty-two feet ten inches and four lines front by one hundred and ninety feet ten inches deep), being the same property which the said Mrs. Lafitte acquired by purchase from Mrs. Elmire M. Charpentier by act passed before said notary, Cuvillier, on the nineteenth of October, 1867, registered in the conveyance office of this parish, in Book 92, fo. 674.

That the payment of this note has been extended to the fifteenth of January next, 1880, and all interest due thereon up to that date has been paid in advance, as per endorsement thereon; that, being unable to meet the payment of said note at its maturity, she
15 has applied to and received from Paul Fourchy, Esquire, who is the last holder and owner of said note, a further extension of time of one year from the said fifteenth of January, 1880, for the payment thereof by paying, as she has done, the interest for such extension in advance.

That in consideration of such further extension of time, and in order to furnish unto the said Paul Fourchy a note negotiable in form, she has, with the assistance of her husband, subscribed, under date hereof, a note drawn by her to her own order and by herself endorsed for the sum of five thousand dollars, payable the 15th January, 1881, at the Mutual National Bank, in this city, and bearing eight per cent. interest per annum from maturity until final payment.

That this note is thus subscribed and furnished by her to said Paul Fourchy for the sole and exclusive purpose as she, said appearer, hereby declares and acknowledges, of conveniencing him, said Paul Fourchy, in negotiating the same, and that it is in no manner, shape, or form intended to replace the note of five thousand dollars identified with the act of mortgage herein recited, which shall be and remain in full force and effect, but it is to be considered as a part and parcel thereof, so that on the payment of the note presently subscribed the aforesaid mortgage note shall be considered paid in the same manner as if the presently subscribed note had never been executed.

And the said appearer here further declared that nothing herein stated or done shall be so construed as to imply a novation of the original mortgage securing the payment of the note above

16 firstly described, as none such is herein intended; but, on the contrary, she expressly declares and acknowledges that the said above-described note and the mortgage securing its payment shall be and remain unimpaired and in full force and effect until the payment of the above sum of five thousand dollars shall have been effected.

And thereupon personally appeared and herein intervened the said Paul Fourchy, of this city, who, after having taken cognizance of the foregoing, hereby acknowledges to have received from said Mrs. Lafitte the amount of interest afore referred to as having been paid to him and declares that he has granted the extension of time herein above stipulated and hereby accepts these presents for himself and all future holder or holders of the note herein subscribed; and having thereupon produced unto me, notary, the afore-described note for five thousand dollars, secured by the mortgage act passed before said notary, Cuvillier, I have duly paraphed the same, as well as the note herein subscribed, "*ne varietur*" for identification herewith, and afterwards delivered both of the said notes to him, the said Paul Fourchy, who hereby acknowledges the receipt and delivery thereof.

Thus done and passed in my office, at the city of New Orleans aforesaid, the day, month, and year first above written, in presence of Michel V. Dejan and Paul Maspero, competent witnesses, residing in this city, who sign these presents with the said appearers and me, notary, after reading hereof.

(Signed) J. A. LAFITTE.
CHS. LAFITTE.
P. FOURCHY.
MICHEL V. DEJAN.
PAUL MASPERO.
JAS. FAHEY, *Not. Pub.*

17 A true copy.
New Orleans, November 6th, 1879. (One word interlined approved.)

[SEAL.] (Signed) JAS. FAHEY, *Not. Pub.*

Recorded in mortgage office, Book 328, f. 349.

New Orleans, Nov. 19, '86.

[SEAL.] (Signed) JAMES KIRKPATRICK, *Cl'k.*
(Signed) GEO. GUINAULT, *D. R.*

Citation Issued to Josephine Adele Livaudais Nov. 23, 1886.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

ALFRED MARCHAND
vs.
Mrs. CHAS. LAFITTE. } No. 11482.

18 The President of the United States of America to Josephine Adele Livaudais, wife of Charles Lafitte, a citizen of the State of Louisiana, residing in the parish of Orleans, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 23 day of November, A. D. one thousand eight hundred and eighty-six, and Independence of the United States of America the 111 year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received Nov. 23, 1886, by the U. S. Marshal, and on the 26th November, 1886, I served a true copy of the within citation and accompanying plaintiff's petition on Mrs. Josephine Adele Livaudais, wife of Chs. Lafitte, defendant herein, by handing same to
19 her in person, in the city of New Orleans and leaving same in her hands.

Returned Nov. 26, '86.

(Signed) R. B. PLEASANTS, *U. S. M'l.*,
By D. J. DELANEY, *D'y Marshal.*

Citation Issued to Chs. Lafitte Nov. 23, 1886.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

ALFRED MARCHAND
vs.
Mrs. CHAS. LAFITTE. } No. 11482.

The President of the United States of America to Charles Lafitte, husband of Mrs. Josephine Adele Livaudais, to authorize his wife, parish of Orleans, State of Louisiana, Greeting:

You are hereby summoned to comply with the demand contained

in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the
20 circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 23 day of November, A. D. one thousand eight hundred and eighty-six, and Independence of the United States of America the 111 year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received Nov. 23, 1886, by the U. S. marshal, and on the 26th November, 1886, I served a true copy of within citation and accompanying plaintiff's petition on Charles Lafitte, one of the defendants herein, husband of Josephine Adele Livaudais, by leaving same at his domicile, No. 45 North Rampart St., in the city of New Orleans, in the hands of his wife, Josephine Adele Livaudais, an adult person over 14 years of age, who stated that her husband was absent from said residence (their common domicile) at time of service and leaving same in her hands. Returned Nov. 26, 1886.

(Signed) R. B. PLEASANTS, *U. S. M.*,
By D. J. DELANEY, *D'y Marshal.*

21 *Answer. Filed December* 6, 1886.

United States Circuit Court, Eastern District of Louisiana.

ALFRED MARCHAND
vs.
Mrs. CHARLES LAFITTE. } No. 11482.

Now into court comes Mistress Josephine Adele de Livaudais, wife of Charles Lafitte, and for answer to plaintiff's petition denies each and every allegation in said petition contained, save and except in so far as the same may be hereinafter admitted.

Defendant admits her signature to the notes sued on, but denies any liability on said notes. Further answering, defendant says that she has never received any consideration for said notes; that the note dated January 15th, 1868, passed from defendant's husband to the Merchants' Mutual Ins. Co., a body corporate domiciled in this city; that the renewal endorsed on said note in 1874 was signed by defendant under the pressing solicitations of the officers of the Merchants' Mutual Ins. Co. and under the controlling influence of her husband; that the note subscribed on the 19th of October, 1879 and the act of acknowledgment of the same day passed before James Fahey, notary public in and for the parish of Orleans, were also signed by said respondent under the pressing so-

licitation of said officers of said insurance company and under the controlling influence of her said husband; that when her signatures
22 of 1874 and 1879 were given by respondent the said Merchants' Mutual Insurance Co. and its officers well knew that respondent was not liable on the notes aforesaid, and that she had never received any consideration for said notes, and that said company was, at the date of said signature, notified by respondent that, although yielding to their demand to endorse the aforesaid notes, she would never pay the same, because the same were not due by her; that said Merchants' Mutual Ins. Co. is still the holder of the aforesaid notes, and that if plaintiff herein is the owner of said notes he has become so only at a recent date and only after maturity of said notes and after prescription had been acquired upon the same, and that said plaintiff has therefore no greater rights in the premises than said Merchants' Mutual Insurance Co. would itself have if it were suing upon said notes; that no demand has been made of defendant for the payment of said notes since the 19th day of October, 1879, and that no acknowledgment of said notes or debt was ever made by respondent since said date, and that no payments have been made by respondent on either the principal or interest of said notes; that said notes are also extinguished by the prescription of five years, which prescription is pleaded in bar of plaintiff's action.

Respondent further avers that said notes were issued by her said husband for his own use and benefit and not for the separate use and benefit of this defendant, and that no part of the consideration received by her said husband for the same in any manner inured to the benefit of this defendant; and defendant further
23 says that the said notes, although issued in her name, really constituted an obligation of her said husband and not of herself, and that said notes have been by her said husband extinguished by payment; and defendant, assuming the character of plaintiff in reconvention, avers that she has never received any consideration from any one of the notes sued on herein, and that if any consideration was ever given for the said notes the same was not given to her, and said consideration did not enure to her benefit; that said notes as aforesaid are prescribed on their face and the mortgage cited in the acts on file is extinguished, null and of no effect, and should be cancelled.

Wherefore defendant prays that the suit of said Alfred Marchand be dismissed at his costs; and, assuming the character of plaintiff in reconvention, respondent further prays that there be judgment herein in her favor and against said Alfred Marchand, plaintiff herein, decreeing that she is not liable on said notes; that said notes are not her legal obligations; that the same are prescribed, and that said notes and the inscriptions in the mortgage office of this parish of the aforementioned acts of January 15th, 1868, and October 19th, 1879, be cancelled and erased, and defendant prays for all costs herein and for general relief.

12, 5, '86.

(Signed) A. J. & OMER VILLERE AND
FARRAR & KRUTTSCHNITT,
Att'ys for Def't.

I authorize my wife, the defendant herein, to file the foregoing answer, and to defend this suit to final judgment.

New Orleans, Dec. 6th, 1886.

(Signed) CHS. LAFITTE.

24 *Empanelling of Jury and Continuance.*

Extract form the Minute Book, November term, 1886.

NEW ORLEANS, THURSDAY, *March* 17, 1887.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

A. MARCHAND
vs.
MRS. CHARLES LAFITTE. } No. 11482.

This cause was called for trial—William S. Benedict, Esq., appearing for plaintiff; A. J. & Omer Villere and Farrar & Kruttschnitt for defendant—when the following-named jurors were called and sworn to well and truly try the issues joined herein, to wit:

1, Jno. S. Mioton; 2, Geo. B. Welting; 3, W. H. Rice; 4, Eug. Lalmant; 5, A. Grambois; 6, Louis Pourscine; 7, Jno. Tosso; 8, H'y Sehers; 9, J. W. Keefe; 10, Jas. E. Tewell; 11, C. J. Adolph; 12, Jos. L. Montieu; and Eugene Lalmant was appointed foreman of the said jury. After hearing pleadings and evidence in part, the court ordered the cause to go over until to-morrow at 11 a. m.

25 *Hearing and Verdict.*

Extract from the Minute Book, November term, 1886.

NEW ORLEANS, FRIDAY, *March* 18, 1887.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

ALFRED MARCHAND
vs.
Mrs. CHARLES LAFITTE. } No. 11482.

This case, as continued from yesterday, was this day resumed, and the counsel for the parties, respectively, as well as the jurors empanneled in the said cause, being all present, the trial was proceeded with. After hearing further evidence and the arguments of counsel for both parties and receiving a charge from the court, the said jury did then and there, through their said foreman, render and deliver the following verdict, viz:

NEW ORLEANS, *March* 18, '87.

We, the jury, find for the defendants and sustain their reconventional demand.

(Signed) EUGENE LALMANT, *Foreman.*

26 *Motion and Order. Time Allowed to Complete Bill of Exceptions.*

Extract from the Minute Book, November term, 1886.

NEW ORLEANS, SATURDAY, *March 19th*, 1887.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

ALFRED MARCHAND
v.
Mrs. CHARLES LAFITTE. } No. 11482.

On motion of W. S Benedict and Henry Renshaw, attorneys for plaintiff, it is ordered that a delay of five days be allowed to complete the bill of exceptions taken herein.

Bill of Exceptions 1. *Filed June* 16, 1887.

United States Circuit Court, Eastern District of Louisiana.

ALFRED MARCHAND
vs.
Mrs. CHARLES LAFITTE. } No. 11482.

27 Be it remembered that on the trial of this cause, before the court with a jury, on the seventeenth and eighteenth days of March, A. D. 1887, under the issue presented by the pleadings in this cause, the plaintiff adduced evidence tending to show the following facts:

First. That at New Orleans, on the 15th day of January, 1868, the defendant, duly authorized by her husband and a judge, in whom was vested the proper authority under the statute, made the note upon which this suit was brought, for the sum of five thousand dollars, and two other notes not at issue in this cause, which last two notes were negotiated by the defendant and the money obtained thereon; that for the purpose of securing the payment of these three notes the defendant, with a proper authorization by the said judge and by her said husband, granted a mortgage in favor of any holder of said notes on certain real estate described in the act of mortgage annexed hereto and, with the note in suit, made part of this bill of exception as Exhibits "A" and "B."

That thereafter, on or about the month of June, 1873, the note in suit was presented to the Merchants' Insurance Company, a corporation of the State of Louisiana, domiciled in the city of New Orleans, by Charles Lefitte, husband of the defendant and one of the directors of said Insurance Company, who obtained a loan
28 from the said Insurance Company of the sum of five thousand dollars upon his individual note for that amount and the mortgage note sued upon herein as collateral security for said loan, stating that all interest upon the note in suit had been paid to the 4th day of January, 1874.

That afterwards, on the 3d day of January, 1874, the said mortgage note herein sued upon was presented to the defendant, Mrs. Charles Lafitte, by the said Insurance Company, who was the holder thereof, as collateral security, as hereinbefore set forth, for the purpose of having the same renewed, and that the defendant, Mrs. Charles Lafitte, then made the endorsements upon the back of said note in the words and figures following, to wit:

"By consent the payment of this note is extended for one year from date without novation."

New Orleans, 3d January, 1874.

(Signed) J. A. LAFITTE.

There was conflicting evidence as to what was assented to by the defendant at the time of this renewal of the note in suit as to the payment of interest.

That on or about the 22 day of October, 1879, various amounts of interest having been paid upon said notes by Charles Lafitte, husband of the defendant, up to that date, the said Insurance Company, through its proper officer, applied for the payment of said note and threatened in case of non-payment a suit upon this note. This application was made by the said Insurance Company through Mr. Charles Lafitte, husband of the defendant, who communicated
29 to his wife not only the application, but the threat made as aforesaid to him.

That on the 30th day of October, 1879, the defendant executed the act of mortgage hereto annexed and marked Exhibit "C," and the note hereto annexed, marked Exhibit "D" (both mortgage and note being made part of this bill of exception), but no evidence was adduced showing any authorization from any judge in addition to the one already set forth; that thereafter various payments were made upon said note by the said Charles Lafitte, husband of the defendant, which resulted in the payment of all the interest due on said note up to the 25th August, 1885, from which date no payment, either of the principal or interest of said note, has been made.

That in the month of September, 1886, the said defendant, being desirous of selling the property covered by the mortgage herein sued upon, offered to pay, as a matter of compromise, a certain sum of money to have the note sued upon and the mortgage given to secure it cancelled. The evidence adduced tended to show that she denied her liability upon the note at the time of this offer; that thereafter, on or about the 9th day of October, 1886, the said insurance company sold the note in suit to the plaintiff herein for a valuable consideration, and that the plaintiff, at the time of such purchase, or his agent, through whom the purchase was made, knew all the facts above set forth with reference to the history of the note in suit.

After the plaintiff had rested his case the defendant was called as a witness on her own behalf and was offered as such witness
30 to show that she never issued the note in question to any other person than her husband; that she never received any benefit from the same, either to herself or to her estate; that she administered her paraphernal property separate and apart from her

husband; that of the three notes given to secure the common mortgage sued upon here she had issued two and had received the amount of the same, to wit, ten thousand dollars, which she had used for the benefit of her separate paraphernal property; that she made the mortgage for fifteen thousand dollars, with the expectation of making repairs and improvements upon her separate paraphernal property, but that she had never used the third note and never issued it except to her said husband.

The plaintiff objected to the defendant being allowed to testify to anything tending to establish the facts offered to be proved by her as above set forth, upon the ground that the law did not permit her under the allegations of her answer to contradict her affidavit, under which she was authorized to effect the loan on her separate property set forth in the act of mortgage; that the allegations of her answer—as she had not pleaded fraud—did not permit her in connection with the acquisition of the said note by the said insurance company to introduce evidence as against her written act and her notarial acts concerning the ownership of said notes; that the allegations of her answer, in the absence of any allegation of fraud, did not enable her to introduce any evidence to prove any want of original consideration for the said note.

31 But the court overruled the objection of the said plaintiff to the said testimony and allowed the same to be given by the defendant notwithstanding his objection.

To which ruling, allowing the defendant to testify to the facts above set forth in accordance with the offer of the defendant, the plaintiff's counsel then and there reserved an exception; and, since the matters herein recited do not appear of record, tenders this his bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Exhibits "A" and "B," referred to and made part of bill of exception, copied at pages 6 and 3 of this transcript.

Exhibits "C" and "D," referred to and made part of bill of exception, copied at pages 13 and 4 of this transcript.

Bill of Exception No. 2. Filed June 16, 1887.

32 United States Circuit Court, Eastern District of Louisiana.

ALFRED MARCHAND
vs.
MRS. CHARLES LAFITTE. } No. 11482.

Be it remembered that on the trial of this cause, before the court with a jury, on the 18th day of March, A. D. 1887, after the trial of this cause and after argument of the same by counsel, the court instructed the jury that since the assignor of the plaintiff had acquired the note sued on after maturity from the husband of the defendant as collateral security for a loan made to him personally, and distinct from any property of his wife, the defendant, and inasmuch as the note in suit was on its face the

note of a married woman, the jury were at liberty to consider the question whether the defendant had ever received any consideration for the said note, and whether the defendant had ever issued the same; that under the laws of Louisiana though there was an authorization by a judge, if, as a matter of fact, the person taking the note of a married woman made the advance directly to the husband and knew that the advance was made to him, the wife would not de bound for the note, nor would her property; that the statements of the husband made to the assignor of the plaintiff
33 unless authorized by the defendant, did not bind her, and that the defendant was not estopped from proving the facts to which she herself testified, as set forth in the offer to prove, referred to in bill of exceptions No. 1, and if they found from the evidence as a fact that the note in suit had never been issued by the defendant until she delivered it to her husband; that it was passed to the assignor of the plaintiff after maturity, and upon its face was the note of a married woman, and the plaintiff knew that the loan was made to the defendant's husband for his benefit and not for hers and delivered the money to him; that the defendant received no part of it, that then their verdict must be for the defendant.

To this instruction and to each proposition contained in it counsel for the plaintiff objected before the jury had retired to consider upon their verdict, and reserved his exception; and, since the matters hereinabove recited do not appear of record, he tenders this his bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exception No. 3. *Filed June* 16, 1887.

United States Circuit Court, Eastern District of Louisiana.

34 ALFRED MARCHAND *vs.* Mrs. CHARLES LAFITTE. } No. 11482.

Be it remembered that on the trial of this cause, before the court with a jury, on the 18th day of March, 1887, after argument of the same by counsel for the respective parties, the counsel for the plaintiff asked the court to instruct the jury:

First. That parole evidence was not admissible to show that the money borrowed on the note made by a married woman under proper judicial authority was received and used by the husband for his own personal use, there being no allegation of fraud or bad faith.

Second. That where the wife represents to the judge in her application for leave to borrow money that she requires a certain sum, and in order to enable her to realize the same she gave a mortgage on her separate property, and he grants such authority, she is bound by the act of mortgage placed thereon and by the notes secured by such martgage, after the same leave her possession or control, whether

through her husband or otherwise, in the absence of any or all allegations that said notes were obtained by fraud or ill practices on the part of the husband or subsequent holder through him.

Third. That whereas in this case the wife has not specially
35 pleaded fraud in the obtaining of said notes by the insurance company or its assignee, the plaintiff, and has been the sole and only witness on her own behalf under allegations in her own behalf, such evidence having been objected to, ought to be excluded from the consideration of the jury; and if it be considered by them at all should be held to be insufficient in and of itself to authorize her to be released from her obligation on said note; that it having been shown that the husband conducted the affairs of his wife relative to her separate property, and it being shown that the wife in good faith gave to her husband the note herein sued upon for the purpose of realizing funds in the event that the same should be needed, and having been benefited thereby, she is precluded under the law from attacking the rights of the holders of said notes, who in good faith have parted with their money upon representations made by her under oath to the proper judge to make the note and mortgage to secure the same, after she has shown that the note was voluntarily given by her to her said husband for the uses and purposes which she testified and expressed as necessary for the benefit of his business thereafter.

Fourth. That the defendant is estopped by her admissions in the act of acknowledgment of the 30th October, 1879, from attacking the ownership of the insurance Co. and its president, Paul Fourchy, in and to said note; that the acts of her husband in paying the interest thereon to that date, her own acts in extending the payment of that note to a future date, or the subsequent acts of her
36 said husband, done in like manner and form, in paying interest on said note thereafter to the 25th August, 1885, or of setting up no defense of want of consideration thereafter, without any defense being pleaded of coercion on the part of the husband, and his acts in the premises are her acts, she having recognized by said acknowledgment of the 30th October, 1879, his authority as her agent.

Fifth. That the act of the wife in endeavoring to obtain money for herself, her husband, or her family, by a mortgage of her paraphernal property, by and under due and proper authority of the laws of the State of Louisiana, with the consent of her husband, is binding upon her. She cannot be permitted, where by reason of her own acts she or her husband have received the full consideration of the note declared upon herein, which went either to her own separate use and benefit or that of the community, or be permitted, without an allegation of fraud, knowledge on the part of the insurance company or its assignee, to injure such insurance company or its assignee, after having received full consideration of the insurance company and assignee and profited thereby, and to injure them or either of them in her own interest.

But the court stated to the jury that the issues upon the evidence which had been introduced in the cause were such as had been

stated by the court to the jury in its general instructions, which instructions are specifically set forth in bill of exceptions No. 2, and instructed the jury that if they found the issuing of the note
37 by the defendant to have been merely to her husband, and that the party taking the same, the assignor of the plaintiff, knew that it was the note of a married woman, and that the consideration which the husband was receiving therefor was a consideration for himself, and not in any respect for her estate, and in fact neither the defendant nor her estate was benefited by the loan made her husband, and that she received no part of the money arising therefrom, that then their verdict must be for the defendant.

To which instructions and to the refusal on the part of the court to give the instructions numbered in this bill of exception Nos. 1, 2, 3, 4, and 5 the defendant excepted and reserved his exception; and, since the matters herein recited do not appear of record, presents this his bill of exception, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1886.

38 ALFRED MARCHAND, *vs.* Mrs. CHARLES LAFITTE } No. 11482

NEW ORLEANS, FRIDAY, *March 18th*, 1887.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that there be judgment in favor of defendant, Mrs. Josephine Adele de Livaudais, wife of Charles Lafitte, dismissing the suit of the plaintiff, Alfred Marchand, at his costs.

It is further ordered, adjudged, and decreed that the said Mrs. Josephine Adele de Livaudais, wife of Charles Lafitte, plaintiff in reconvention, do have judgment in her favor and against Alfred Marchand, defendant in reconvention, decreeing that she is not liable on the notes herein sued upon, to wit, the one bearing date the 15th of January, 1886, made by plaintiff in reconvention, duly authorized by her husband, for the sum of $5,000.00, at one year, to her own order and by her endorsed, with interest at the rate of 8% per annum from maturity until paid; the other for a like amount, with 8% per annum interest from maturity, made by said plaintiff in reconvention on the 30th day of October, 1879, payable on the 15th day of January, 1881. Defendant is entitled to have the in-
39 scriptions in the mortgage office of the parish of Orleans, State of Louisiana, of the following acts, viz., 1st, an act

before P. C. Cuvillier, notary, of equal date with the first-mentioned note to secure the payment of the same, with interest and attorneys' fees, fixed at 5%, whereby the said Mrs. Lafitte, under authority of the judge of the second district court for the parish of Orleans, did specially mortgage in favor of any holder of said note certain real estate situate in the parish of Orleans and fully described in said act; 2nd, the act before James Fahey, notary, on the 30th of October, 1879, to secure the second-mentioned note, in which Mrs. Lafitte granted a special mortgage on the same property described in the act before said P. C. Cuvillier, notary, above set forth, cancelled, and erased, with all costs herein.

Judgment rendered March 18, 1887.

Judgment signed June 16, 1887.

(Signed) EDWARD C. BILLINGS, *Judge.*

Motion and Order for Writ of Error. Entered and Filed 18 *June,* 1887.

U. S. Circuit Court.

ALFRED MARCHAND
vs.
Mrs. CHARLES LAFITTE. } No. 11482.

40 On motion of W. S. Benedict, attorney for plaintiff, and on suggesting there is error to the prejudice of plaintiff in the verdict of the jury and the final decree herein, and that plaintiff is aggrieved thereby, and is desirous of taking a writ of error, to operate as a supersedeas, therefrom, it is ordered by the court that a writ of error be allowed plaintiff, same to operate as a supersedeas, same to be returnable in the Supreme Court of the United States on its next return day, on bond being given in the sum of five hundred dollars, conditioned according to law, with good and solvent surety, as the law directs. It is further ordered this motion be entered on the minutes of the court.

Bond for Writ of Error. Filed June 18, 1887.

Know all men by these presents that we, Alfred Marchand, as principal, and Andrew Hero, Jr., of New Orleans, La., as surety, are held and firmly bound unto Mrs. Josephine Adele Livaudais, wife of Charles Lafitte, in the full and just sum of five hundred dollars, to be paid to the said Mrs. Charles Lafitte, certain attorney,
41 executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Alfred Marchand is plaintiff and said Mrs. Charles Lafitte is defendant, a judgment was rendered against said plaintiff and in favor of said

defendant, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Mrs. Josepine Adele Livaudais, wife of Charles Lafitte, citing and admonishing her to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Alfred Marchand shall prosecute his writ to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) ALFRED MARCHAND,
By his att'y, W. S. BENEDICT. [L. S.]
ANDREW HERO. [L. S.]

Sealed and delivered in the presence of—

——— ———.

42 Bond approved.
June 18, 1887.
(Signed) EDWARD C. BILLINGS, *Judge.*

UNITED STATES OF AMERICA, *Eastern District of Louisiana,* } *ss:*

Personally appeared Andrew Hero, Jr., who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans and State of Louisiana and is worth the full sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) ANDREW HERO.

Subscribed and sworn before me this 18th day of June, 1887.
[SEAL.] (Signed) F. KIRCHNER, *Not. Pub.*

43 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 42 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Alfred Marchand *vs.* Mrs. Charles Lafitte, No. 11482 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30th day of June, A. D. 1887.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30 day of June, A. D. 1887.

EDWARD C. BILLINGS, *Judge.*

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Alfred Marchand, of Paris, Republic of France, plaintiff, and Josephine Adele Livaudais, wife of Charles Lafitte, of New Orleans, Louisiana, a manifest error hath happened, to the great damage of the said Alfred Marchand, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court of the United States, this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

[Endorsed:] United States circuit court. No. 11482. Writ of error. Alfred Marchand *versus* Mrs. Chas. Lafitte. Filed June 18, 1887. E. R. Hunt, clerk.

45 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Josephine Adele Livaudais, wife of Charles Lafitte, of New Orleans, Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Alfred Marchand is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Alfred Marchand, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18 day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

EDWARD C. BILLINGS, *Judge.*

46 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11482. Alfred Marchand, of Paris, Republic of France, plaintiff, *vs.* Josephine Adele Livaudais, wife of Charles Lafitte, of New Orleans, Louisiana. Citation. Filed June 21, 1887. E. R. Hunt, clerk.

Marshal's Return.

Received June 18, 1887, by the U. S. marshal, and on the 18th day of June, 1887, I served a true copy of within citation in error on Josephine Adele Livaudais (wife of Charles Lafitte, of New Orleans, Louisiana), defendant in error herein, by handing the same to her in person at her domicile, No. 45 N. Rampart street, in the city of New Orleans, and leaving the same in her hands.

Returned June 21, '87.

R. B. PLEASANTS,
U. S. Marshal,
By DAN. J. DELANEY,
D'y Marshal.

Dan. J. Delaney, being duly sworn, deposes and says he is a lawful deputy U. S. marshal for the eastern district of Louisiana, and that the above-written return of service is truly and correctly set forth.

DAN. J. DELANEY,
D'y U. S. Marshal.

Sworn to & subscribed before me this 21 day of June, 1887.

[Seal of the U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 1077. Alfred Marchand, plaintiff in error, *vs.* Josephine Adele Livaudais, wife of Charles Lafitte. Filed September 29, 1887.

IN THE

Supreme Court of the United States.

ALFRED MARCHAND, *Plaintiff in error*,	No. 124.
vs.	Oct. T.
Mrs. CHARLES LAFITTE.	1890.

Brief for Plaintiff in Error.

History of the Case.

January 9th 1868. Mrs. Charles Lafitte appeared before J. W. Thomas, Judge of the Second District Court of New Orleans, "and out of the presence of her hus-"band, declared that she desired to borrow $15,000. "and grant a special mortgage on her separate proper-"ty, to secure said loan with all interest and costs, "and she, said lady, having satisfied me that the "money about to be borrowed is solely for her sepa-"rate advantage and benefit, I do now furnish this "certificate of the above facts pursuant to law." Rec. p. 7.

January 15th 1868, Mrs. Charles Lafitte, authorized by her husband and with the above special statutory authorization of the competent Judge, by Act before B. C. Cuvillier, Notary public, declared that she is justly and truly indebted to Placide Bienvenu in the full sum of $15,000 lawful money by him advanced for her separate benefit and advantage the receipt whereof is hereby acknowledged, and for the reimbursement of which the said Mrs. Lafitte with the authorization of

her husband, has made and subscribed three several promissory notes to the order of and endorsed by herself, all payable January 1, 1869, to bear interest from maturity, if not then paid, at the rate of eight per cent per annum until final payment, which notes after being paraphed, were handed over to P. Bienvenu here present and acknowledging due receipt hereof. The act further provides for Attorney's fees at five per cent on the amount sued for, in case it shall become necessary to institute legal proceedings to recover the amount of the said notes, or of any part thereof. The description of the real-estate mortgaged then follows: and by the intervention of a third person, holder of unpaid notes given by a purchaser precedent to Mrs. Lafitte, she in her purchase having assumed their payment, the three notes for $15,000–were made to prime the vendor's privilege and mortgage. The act bears confession of judgment in favor of any holder or holders of said notes until final payment, with the clause *de non alienando*, and waiver of certain formalities of law in case of a resort to *via executiva*. Mrs. Chas. Lafitte also obliges herself to keep the property insured and declares that she is not tutrix to any minor. Rec. p. 4.

January 3, 1874. By consent the payment of this note is extended one year from date without novation.

[Signed] J. A. LAFITTE.

October 30th 1879. Mrs. Charles Lafitte, duly assisted by her husband, appeared before James Fahey, Notary public, and declares and acknowledges that she is justly and truly indebted on a certain note (minutely describing one of the three set forth in the preceeding Notarial Act before P. C. Cuvillier, and the mortgage on her separate property to secure its payment,) and that being unable to meet said note at its maturity, she has applied to and received from Paul Fourchy who is the last holder of said note a further extension of time of one year from January 15th 1880 by paying as she has done the interest for such extension in advance. That for the convenience of said Fourchy she, authorized by her husband, has subscribed under this date a note drawn by her to her own order, and by herself endorsed for the sum of $5,000–payable January 15th 1881, bearing interest at eight per cent per annum from maturity till final payment. That it is not intended to replace the first note of $5,000 identified with the mortgage herein recited, which shall be and remain in full force and effect, but it is to

be considered a part and parcel thereof, so that on the payment of the note presently subscribed the aforesaid mortgage note shall be considered paid in the same manner as if the presently subscribed note had never been executed. And that nothing herein stated or done shall be so construed as to imply a novation of the original mortgage securing the note firstly described. See Record p. 7, 8 and 9.

This suit is brought upon the two notes to recover $5,000, with interest, Attorney's fees, and costs of suit, with the reservation of all rights and actions in equity in your petitioner in and to the special mortgages etc. Rec. pp. 1 and 2.

The defense is that Mrs. Charles Lafitte never received any consideration for said notes; that the note dated January 15th 1868 passed from the defendant's husband to the Merchants Mutual Insurance Company; that the renewal endorsed on said note in 1874. was signed by Defendant under the pressing solicitations of the officers of the Company and under the controling influence of her husband; so too the act before James Fahey, N. P.; that when her signatures of 1874 and 1879 wer given by Respondent, the said Insurance Company and its officers well knew that Respondent was not liable on the notes aforesaid, and that she had never received any consideration for said notes, and that said Company was at the date of said signature notified by Respondent that, although yielding to their demand to endorse the aforesaid notes she would never pay the same because they were not due by her; that the said Company is still the owner of the said notes and that if Plaintiff herein is the owner of said notes he has become so only at a recent date and only after maturity of said notes and after prescription had been acquired upon the same, and that said plaintiff has therefore no greater right in the premises than said Insurance Company would itself have, if it were suing on said notes; that no demand has been made on defendant for the payment of said notes since October 19th 1879, and that no acknowledgment of said notes or debt was ever made by Respondent since said date, and that no payments have been made by Respondent on either the principal or interest of said notes; which are extinguished by the prescription of five years.

Respondent futher avers that *said notes were issued by her said Husband for his own use and benefit*, and not for the separate use and benefit of this defendant, and that no part of the consideration received by her

said husband for the same in any manner inured to the benefit of this defendant; and that the said notes although issued in her name, really constituted an obligation of her said husband and not of herself; and that the said notes have been by her said husband extinguished by payment; and defendant assuming the character of Plaintiff in reconvention avers that she has never received any consideration from any one of the notes sued on herein, and that if any consideration was ever given for the said notes the same was not given to her, and said consideration did not enure to her benefit; that said notes as aforesaid are prescribed on their face and the mortgage cited in the acts on file is extinguished, null and of no effect, and should be cancelled.

She therefore prays for judgment in her favor with costs, that said notes are not her legal obligations, and are prescribed; that said notes and mortgages be cancelled and erased etc. Record p. 11 and 12.

The case was tried by a jury and the verdict and judgment were in favor of the Defendant and the reconventional demand sustained.

The questions of evidence and the charge of the Judge raised by the bills of exception present the issues of law to be solved.

ASSIGNMENT OF ERRORS. BILL OF EXCEPTION NO. 1.

A. *The inferior court erred in admitting the testimony of the Wife in support of the Defense, after the case of the Plaintiff had been closed.* The wife was called as a witness in her own behalf to prove that she never issued the note in question to any other person than her husband; that she never received any benefit from the same, either to herself or to her estate; that she administered her paraphernal property separate and apart from her husband; that of the three notes given to secure the common mortgage sued upon here she had issued two and had received the amount of the same, to-wit:–$10,000 which she had used for the benefit of her separate paraphernal property; that she made the mortgage for $15,000 with the expectation of making repairs and improvements upon the separate paraphernal property; but that she had never issued the third note and never issued it except to her said husband.

The objection was that the law did not permit her under the allegations of her answer to contradict her

affidavit under which she was authorized to effect the loan on her separate property set forth in the act of mortgage; that the allegations of her answer—*as she had not pleaded fraud*—did not permit her in connection with the acquisition of the said note by the said Insurance Company to introduce evidence as against her written act and her notarial acts concerning the ownership of said notes; that the allegations of the answer, in the absence of any allegation of fraud, did not enable her to introduce any evidence to prove any want of original consideration for the said note. All this was overruled, and the Defendant allowed to testify. See Bill of Exception, No. 1, p. 14, 15, 16.

At the moment of the trial, the facts proved stood as follows:-

First. That on *January* 15th 1868, the Defendant under the statutory authority of a Judge, her husband aiding and assisting, made three notes for $5,000 each and secured them by a special mortgage on her paraphernal property.

Second. That about June 1873, the note sued upon was presented by her husband to the Merchants Insurance Company, he being a Director therein, who obtained a loan from them of the sum of $5,000 upon his individual note for that amount and the mortgage note sued upon herein as collateral security for said loan, stating that all interest had been paid upon the note in suit to January 4th 1874.

Third. That afterwards *January* 3rd 1874, the said mortgage note herein sued upon was presented to the defendant, Mrs. Charles Lafitte, by the said Insurance Company, who was the holder thereof as collateral security, as herein before set forth, for the purpose of having the same renewed, and that the defendant, Mrs. Charles Lafitte, then made the endorsements upon the back of the said note in the words and figures following to-wit:-(Record p. 3 and 15) "By consent the "payment of this note is extended for one year from "date without novation." *New Orleans January* 3, 1874, J. A. LAFITTE. There was conflicting evidence as to what was assented to by the defendant at the time of this renewal of the note in suit as to the payment of interest.

Fourth. that about *October* 22, 1879, various amounts of interest having been paid upon said notes by Charles Lafitte, husband of the defendant, up to that date, the said Insurance Company through its proper officer,

applied for the payment of said note and threatened in case of non payment a suit upon this note. This application was made through Mr. Charles Lafitte, husband of the defendant, who communicated to his wife not only the application, but the threat made as aforesaid to him.

Fifth. That on *October* 30th, 1879, the defendant executed the additional note for $5,000 recognizing her obligation to pay it as well as the original, and the validity of the original mortgage given to secure them; but no evidence was adduced showing any authorization from any Judge in addition to the one already set forth; that thereafter various payments were made upon said note by the said Charles Lafitte, husband of the defendant which resulted in the payment of all the interest due on said note up to August 25, 1885, from which date no payment, either of principal or interest of said note has been made.

Sixth. That in *September* 1886, the defendant being desirous of selling the property covered by the mortgage herein sued on, offered to pay, as a matter of compromise, a certain sum of money, to have the note sued upon and the mortgage given to secure it cancelled. The evidence adduced tended to show that she denied her liability upon the note at the time of this offer; that thereafter, on or about *October* 9, 1886, the said Insurance Company, sold the note in suit to the Plaintiff herein for a valuable consideration, and that Plaintiff at the time of such purchase or his agent through whom the purchase was made, knew all the facts above set forth, with reference to the history of the note in suit.

The Statute of Louisiana upon which this suit is based is embodied in the Articles 126, 127 and 128 of the Revised Code of 1870 as set forth in full in Fortier vs. New Orleans, 112 U. S. p. 446, and it is there decided that "the effect of these articles is simply to estab-"lish a new rule of evidence in case of loans of money "made to married women". The old rule was:—"a "debt contracted by a married woman, whether sepa-"rated in property from her husband or not, could not "be enforced against her unless the creditor establish-"ed affirmatively that the debt inured to her separate "benefit." The new rule is:—"the effect of the auth-"orization and certificate of the judge was to relieve "the creditor from the burden of proving that the money "lent by him to the wife inured to her benefit, and to

"cast the burden on the wife to prove that it did not". The evils in the old law were [a] the legal restrictions on alienation of the wife's paraphernal property [b] the inhibition upon her "to bind herself for her hus- "band, or conjointly with him, for debts contracted "by him before or during marriage". In other words, the separate property of the wife was to be sacredly devoted to the use and benefit of the Family; but she could either mortgage it or sell it with the authorization of her husband, or in case of refusal or absence of the husband, with the authorization of the Judge; but should it be proved that the husband has received the amount of the paraphernal property alienated by the wife or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same. La. Code, 2367–2390.

"The wife has even during marriage a right of "action against her husband for the restitution of her "paraphernal effects and their fruits as above express- "ed." La. Code, 2368–2391.

Separate property is specially defined, "that which "either party [Husband or Wife] brings in marriage "or acquires during the marriage by inheritance or "donation made to him or her particularly," La. Code Art. 2314–2334. This paraphernal property might be administered personally by the wife without the assistance of her husband; but that which is not administered by the wife separately and alone is considered to be under the management of her husband. The fruits belong to the Community of gains. Ib. 2361, 2362, 2363 or 2384, 2385, 2386.

This being the situation at the time the Defendant was offered as a witness to make out her defense, the first objection to her competency was that under her pleadings she had no legal right to contest the original consideration of her note and by her testimony to annul and destroy the obligation. The object and plain intent of the testimony was to show that her husband had made use of the mortgage note for $5,000 with the intent to defraud her; that he had obtained possession of it wrongfully, and had so negotiated it as to enable him to convert its proceeds to his own purpose, and that no portion of the proceeds enured to her benefit. And inferentially, that without being her Agent for raising the money for her as the honest custodian of of the note he had pledged it as collateral for his own

private, individual debt, and that if he had acted honestly and in good faith with the Insurance Company, he would have made some entirely different disposal of the money-proceeds coming into his hands. Finally, that though the proceedings of making the three notes and securing them by the mortgage on her paraphernal property were all in proper form and entirely legal, and tho' her husband was entrusted by her with the possession of the note, in suit to raise the money on it for her, he violated his trust and no part of the proceeds enured to her benefit and that the form in which the transaction with the Insurance Company clothed itself was a simulation for the purpose of benefitting her husband and injuring her, of which the company was fully cognizant; that the transaction as made was virtually a violation of Article 2412; that it made the wife an obligor for her husband and liable "conjointly with him for debts contracted by him be-"fore or during the marriage". Consequently, the dealing with the Insurance Company in borrowing money on her mortgage note as collateral was contra legem, and that evidence to show all this is admissible under the pleadings.

It is clear, that if, after entrusting the note to her husband for the sole purpose of raising money upon it, after being authorized by the Judge to make it and send it into the market, she never could complain that she had not received the money; or that her husband had defrauded her by converting the money to his own use, thereby releasing her from an obligation she had assumed as a *femme sole*. For the very purpose and end-aim of the new statute was to leave the door open for this possible and potential result. Banks do not discount long mortgage papers: but Insurance Companies do. The husband instead of employing a money-broker to get her notes discounted, succeeds in raising the money on them from the Insurance Company where he is a director. He gets the money for her; and she now asks to prove, in the teeth of the Statute that he never paid over the money to her; that it never enured to her benefit. This, it is submitted, cannot be legally done. It may have been the law of Louisiana anterior to the act of 1855, but it never has been since; for it now says to all married women, unless you declare in your answer that your husband defrauded you in the way stated, and the man who advanced you the money aided and assisted your husband in thus defrauding you, you cannot be heard.

"Objection founded on the irregularity of the pro-
"ceedings before the judge, and on the use of the
"money loaned and the like in the absence of fraud or
"complicity on the part of the lender, have no force."

"The lender is not bound to look behind the judge's
"certificate, and is not concerned as to the actual use
"made of the money after it is paid to the wife, or
"according to her direction."

Pilcher *vs.* Pugh, 28 La. An. 494.
McLellan *vs.* Dane, 32 La. An. 1197.
Henry *vs.* Gauthreaux, 32 La. An. 1103.
Dougherty *vs.* Insurance Co. 35 La. An. 629.
Chaffe *vs.* Watts, 37 La. An. 324.
Sentell *vs.* Stark, 37 La. An. 679.
Fortier *vs.* New Orleans Bank, 112 U. S. 439.

"The rule on this question as established in our
"jurisprudence closes the door to the wife's attack
"against a mortgage which she has executed with the
"authorization of the Judge, in the absence of any
"allegation of fraud against the creditor, himself, or
"of fraud committed at least to the knowledge of such
"creditor."

Gibson *vs.* Hitchcock, 37 La. An. 209.

There is no allegation in the defense under which any of the proposed evidence could be given; on the contrary, there is nothing therein contained which in the slightest degree conflicts with the good faith of the Husband and of the Insurance Company, at the time the contract attempted to be impugned was concluded in June 1873.

11.

But the Court admitted the testimony, and this gave rise to Bills of Exceptions No. Two, rec. p, 16, and No. Three, rec. p. 17.

These involve the following additional Assignments of error.

B. The inferior Court erred in charging the jury as follows: "that since the Assignor of plaintiff had acquired the note sued on after maturity from the husband of defendant as collateral security for a loan made to him personally, and distinct from any property of his wife, the defendant, and inasmuch as the note in suit was on its face the note of a married woman, the jury were at liberty to consider the question whether the defendant had ever received any consideration for the said note, and whether the defendant had

ever issued the same; that under the laws of Louisiana though there was an authorization by a judge, if, as a matter of fact, the person taking the note of a married woman made the advance directly to the husband and knew the advance was made to him, the wife would not be bound for the note, nor would her property; that the statements of the husband made to the assignor of the plaintiff unless authorized by the defendant, did not bind her, and that the defendant was not estopped from proving the facts to which she herself testified, as set forth in the offer to prove referred to in Bill of Exception No. One, and if they found from the evidence as a fact that the note in suit had never been issued by the defendant until she delivered it to her husband; that it was passed to the assignor of the plaintiff after maturity, and upon its face was the note of a married woman, and the plaintiff knew that the loan was made to the defendant's husband for his benefit and not for hers, and delivered the money to him; that the defendant received no part of it, that then their verdict must be for defendant."

And the Court also erred in refusing to charge as requested.

A. That parol evidence was not admissible to show that the money borrowed on the note made by a married woman under proper judicial authority was received and used by the husband for his own personal use, there being no allegation of fraud or bad faith.

B. That when the wife represents to the Judge in her application for leave to borrow money that she requires a certain sum, and in order to enable her to realize the same she gave a mortgage on her separate property, and he grants such authority, she is bound by the act of mortgage, after the same leaves her possession or control, whether through her husband or otherwise, in the absence of any and all allegations that said notes were obtained by fraud or ill practices on the part of the husband or subsequent holder through him.

C. That whereas in this case the wife has not specially pleaded fraud in the obtaining of said notes by the insurance company or its assignee, the plaintiff, and has been the sole and only witness on her own behalf, such evidence having been objected to ought to be excluded from the consideration of the jury; and if it be considered by them at all, should be considered insufficient in and of itself to authorize her to be re-

leased from her obligation on said notes; that it having been shown that the husband conducted the affairs of his wife relative to her separate property, and it being shown that the wife in good faith gave to her husband the note herein sued upon for the purpose of realizing funds in the event that the same should be needed, and having been benefited thereby; she is precluded under the law from attacking the rights of the holders of the said notes, who in good faith have parted with their money upon representations made by her under oath to the proper judge to make the note and mortgage to secure the same, after she has shown that the note was voluntarily given by her to her said husband and for the uses and purposes which she testified and expressed as necessary for the benefit of his business thereafter.

[d]. That the defendant is estopped by her admissions in the act of acknowledgment of October 30th, 1879, from attacking the ownership of the insurance company and its president, Paul Fourchy, in and to said notes, that the acts of her husband in paying the interest thereon to that date, her own acts in extending the payment of that note to a future date, or the subsequent acts of her said husband, done in like manner and form, in paying interest on said note thereafter to August 25, 1885, or of setting up no defense of want of consideration thereafter, without any defense being pleaded of coercion on the part of the husband, and his acts in the premises are her acts, she having recognized by said acknowledgement of Oct. 30, 1879, his authority as her agent.

[e]. "That the act of the wife in endeavoring to "obtain money for herself, her husband or her family, "by a mortgage of her paraphernal property, by and "under due and proper authority of the laws of the "State of Louisiana, with the consent of the husband, "is binding upon her. She cannot be permitted, when "by reason of her own acts she or her husband has re- "ceived the full consideration of the note declared "upon herein, which went either to her own separate "use and benefit or that of the community, or be "permitted, without an allegation of fraud and know- "ledge on the part of the insurance company or its "assignee, after having received full consideration of "the insurance company and assignee and profited "thereby, and to injure them or either of them in her "own interest."

And in charging the jury as follows:

"The issues upon the evidence which has been introduced in the cause were such as had been stated by "the court to the jury in its general instructions, which "are specially set forth, in bill of exception No. 2 "[ante p.] and instructed the jury that if they "found the issuing of the note by the defendant to "have been merely to her husband and that the party "taking the same, the assignor of the plaintiff, knew "that it was the note of a married woman, and that "the consideration which her husband was receiving "therefor was a consideration for himself, and not in "any respect for her estate, and in fact neither the defendant nor her estate was benefited by the loan "made her husband, and that she received no part of "the money arising therefrom, that then their verdict "must be for the defendant."

It is evident from these bills of exceptions, that the lower court found, in the *shape* of the original transaction between the insurance company and Defendant's husband, *prima facie* evidence of a fraudulent agreement between them to deceive and wrong the wife. But it is submitted that whilst there is no allegation in the defense to warrant the admission of such evidence, yet the simple delivery of the mortgage note by the wife to the husband, whether past due or not, was full authority to him to dispose of the note, *i. e.* to *alienate* it in any way he pleased; to get it discounted, sell it, pledge, and convert it into money;—the only restriction upon this power being that no portion of the proceeds should go to the payment of *any antecedent debt of the husband*. If the transaction when entered into was clearly and plainly one in which the wife became security for her husband or bound herself or her property for his then existing debts, then her note for such a purpose in the hands of the husband's creditor, who takes it knowingly, is utterly void. "But it does not "follow that because the money borrowed by the wife "with the authorization of the Judge was used to pay "the husband's debts the note and mortgage given "therefor are void and cannot be enforced. To make "such a defense good it must be shown that the creditor knew *when he made the loan* that the money was "not to be used for the separate benefit or advantage of the wife; for the lender having in good faith paid the money to the wife or to another by her direction, is not bound since the passage of the Act of 1855 to see

that it is used for her benefit."

Fortier *vs.* New Orleans bank, 112 U. S. 449.

The wife in this case must have known, when she admittedly entrusted her note to her husband to raise money on it, that it had been past due for some time. But this fact appears to be of not the slightest value as an element of decision. Mortgages, whether in the shape of bonds or notes, are just as negotiable after as before maturity. Nor was it at all necessary in this case, for the insurance company to enquire of her before taking the note in pledge whether she had any legal or equitable defence to it. She herself negotiated it by her Agent her husband, and he received the proceeds. How could the insurance company know what the husband was about to do with these proceeds? would they have lent the money to enable the husband to practice a legal fraud—not upon the wife—but on themselves? why, this is not even alleged. Knowledge that the wife was not liable on the notes and that she had never received any consideration for them, is not even attributed to the company until January 3, 1874, when she consented to a renewal for a year without novation. Rec. p. 3, and answer, Rec. p. 12.

So far as the record discloses, there never was any other transaction between the insurance company and the husband in any way. And we submit that there is *nothing in the form of it objectionable in law.* "Where-"ever a party has the power to do a thing (statute "provisions being out of the way) and means to do it, "the instrument he employs shall be so construed as to "give effect to his intention," *ut res magis valeat quam pereat.*

Bond *vs.* Bunting, 78 Penn. Rep. 210.

The husband was manifestly the Agent of his wife, as well as the administrator of her paraphernal property and the Head of the Community, at the time he raised the money. To say to the jury that the company "acquired the note sued on after maturity from "the husband of the Defendant as collateral security "for a loan *made to him personally*, and *distinct from* "*any property of his Wife.*" and "as the note sued "on was on its face the note of a married woman, the "jury was at liberty to consider the question whether "the Defendant had ever received any consideration "for the said note, and whether the Defendant had "ever issued the same," was not warranted by the

evidence or the pleadings, and we submit, was error of law. So too, the language of the exception as to the law of Louisiana, "if, as a matter of fact, the person "taking the note of a married woman made the ad- "vance directly to the husband and knew the advance "was made to him, the wife would not be bound for "the note, nor would her property", was entirely too broad and calculated to mislead the jury; for without a distinct charge of fraud both upon her husband and the creditor advancing the money, such a defence could not be listened to. The doctrine set forth annuls and utterly defeats the statute. It opens the door to immense frauds. It degrades marriage and the Family and is an open premium for perjury in married women. In short, it is *contra bonos mores*. And "if they found "from the evidence as a fact that the note in suit had "never been issued by the Defendant until she delivered "it to her husband, that it was passed to the Assignor "of the plaintiff after maturity, and upon its face was "the note of a married woman, and the plaintiff knew "that the loan was made to the Defendant's husband "and for his benefit and not for hers and delivered the "money to him; that the Defendant received no part of "it, that then their verdict must be for the Defendant." It is contended, that all this portion of the charge is error because the issue of the note to her husband was a complete and perfect issue of the note; and equivalent to its assignment to the husband. Longhery's Appeal, S. C. of Penn. May 3rd, 1880. That being passed after the maturity was a matter of no significance whatever; that there was no allegation, and no proof but the wife herself, that the loan was made to the Defendant's husband for his benefit and not for hers; that the delivery of the proceeds to him, her duly authorized agent to receive it was regular and legal; and whether the Defendant received no part of it was wholly irrevelant and inadmissible under the pleadings. The want of correspondence between the averment and the proof offered was made a prominent point of objection to the defense from its begining to the very end, and is radical and visceral. The verdict of the jury does not cure it. Shaw *vs.* Noble, 15 La. Annual, 305.

In all cases of Fraud, the rule is the same both in Equity, and at Law, it must be distinctly alleged and distinctly proved; the intention to defraud, both as to Husband and Insurance Company must be set out.

Moss *vs.* Riddle, 5th Cranch 351.

III.

The Statute of Louisiana under which the wife's mortgage was executed, cannot be construed, as we have shown, so as to impose upon the creditor the burden of proving that the money loaned enured to the separate benefit of the Wife. But still less can it be construed so as to impair the legal relations of Husband and Wife.

The husband received the money of the insurance company or the Agent of his Wife, and the holder of her Note for the purpose of negotiation. Her complaint is that she received no part of the consideration, and that he converted the money to his own use in collusion with the insurance company to defraud her.

It is true that no such allegations are found in her defense and reconventional demand; but this is her manifest position; this was what the lower court permitted her to prove; these were the facts the jury had to find to render their verdict, and the Court to give judgment.

We submit that the wife cannot legally make any such allegations. The respect due from her to her Husband forbids it absolutely. True, she may sue him and recover from him any moneys he may have received from her paraphernal property and the paraphernal effects and their fruits and the law gives her a mortgage on all the property of her husband for the reimbursing of the same; but the law according to the wife this action, is not in the slightest degree based on fraud in the husband, or on his breach of faith.

In other words, he can with absolute impunity by the aid of the Statute get the paraphernal property or its proceeds into his hands with her consent and then convert it to his own use, and the Wife's only remedy is her action and her legal mortgage. She is under marital power and authority and the authority of the special statute combined. Society says to her: "we "have opened the door for your husband to injure you "by wasting your property or its proceeds if you en- "trust it to him," and so our laws actually declare. And the Courts say to her: "May a married woman, "thus bind herself by acting with her husband? Why "not? The fact that she can be sued with her husband, "entitles her with him, to do all proper acts relative "to the defense of her rights that are involved in the

"suit. It was proper for her interest, that she and her "husband should make an arrangement for time, in "order to prevent a sacrifice of her property. Both "are therefore bound to all the consequences of the "arrangement. True, she did not bind herself by a sep- "arate acknowledgment, but that form of proceeding "does not apply to such an act. True, also, a door is "here open through which the wife may be imposed "upon by her husband; but we find it open and would "not shut it, for it is open by the very confidence that "ought to exist between husband and wife; and con- "fidence will hold it open so long as pure affection is "allowed to be a legitimate element of the marriage "relation. In this relation we find the highest, and "noblest and purest and therefore the most civilising "illustration of the confidence of human beings in each "other; and such can never be reposed without the "risk of imposition. Let it remain for the good it "does and notwithstanding its dangers. When the "law invades the sacred confidence of the marriage re- "lation in order to save the wife from the faults or mis- "fortunes of the husband, it, in some measure loosens "the bond whose principal virtue consists in its close- "ness."

McCullough *vs.* Wilson, 21st Penn. Rep. 442.

How much more forcibly this applies to the married women under the special statute involving not only matrial authority, but the authorization of the judicial department of the State.

Upon examination this will be found the complete notion of the civil law upon which the Code Napoleon and all its progeny of Codes in modern times have been founded; not the exploded and degraded notion that woman was a poor, weak, wretched creature, the plaything of a man, whose fragility of sex, *fragilitas sexus*, or her *imperitia*, inexperience, dullness or stupidity required the aid and assistance of her husband to protect her from being wronged; this is plainly untenable, and would place under authority all other women, the widows and spinsters. As civilization began with the institution of monogamy and the civil rights of the Wife, and men made the laws, the respect due from the Wife to the Husband is their continuously existent foundation; and this respect ceasing to exist, the Family necessarily perishes. The aid, assistance and authorization of the Husband is to avoid the withdrawal of the woman from the care of the marriage domicile

and the children of the marriage: she is not to abandon this sphere after obtaining authority from judge and husband to run around after her husband to watch and see that he does not defraud her by collecting the proceeds of her paraphernal property and applying it to his own uses. The law gives her a far better remedy. It is so clear that this is the real condition of the law nowadays, that, in the growing signs of the times, it may be seen almost *ad nauseam* in the daily papers of our large cities. In all the various spheres of human activity,–Religon, sciences, art; the pulpit, the bar, the lecture-room, the Academies, the *fragilitas sexus* is an exploded idea. We no longer aim at assisting women, but are striving to get her to assist herself in the most appropriate way and she is rapidly learning this lesson. Now in examining the Wife's defense herein and her reconventional demand, altho' we find the due authorization of her Husband "to file the fore-"going answer, and to defend this suit to final judg-"ment," we see at once the reason for the omission of the indispensable allegation of fraud and collusion in both Husband and the insurance company, to injure her. The husband never could have signed such a defense authorizing his wife to make it. *Nemo allegans turpitudinem suam audiendus.* But to this the wife may reply: "This may be so, but if my Husband re-"fused to sign, I might get the authorization of the "Judge." This is even more unreasonable than the other position. The simple fact is that the defense relied on can be neither alleged nor proved. The wife did not allege it but tried in vain to prove it. The husband was not even called as a witness to support his wife. A single witness to make out such a case must have either a wonderfully trust-worthy character or the facts testified to must be very easily established. La. Code. Articles, 2257-2277. How a husband can suddenly have his bank account enlarged by $5,000, and the wife and children derive no benefit from it whatever, would certainly indicate more than the selfishness usually prevalent among married men of the present day.

IV.

It is possible that the lower Judge saw in the facts proved for the Plaintiff on the trial something more than the fraud which was not even alleged for the defense, but which would in his opinion, justify the ad-

mission of evidence of almost any kind : and that is the conclusion reached from the form of the transaction with the Insurance Company: that the transaction was in violation of the law as laid down in articles 2398-2412. "The Wife whether separated in property by contract "or by judgment, or not separated, cannot bind herself "for her husband, nor conjointly with him, for debts "contracted by him before or during the marriage." In this view the Court held and virtually so instructed the jury that the transaction was a fraudulent simulation and *contra legem*; and that "since the Assignor "of the plaintiff acquired the note sued on after ma- "turity, from the husband of the defendant as collater- "al security for a loan made to him personally, and "distinct from any property of his wife, the defendant, "and inasmuch as the note in suit was upon its face the "note of a married woman, then the jury were at "liberty" &c., &c., as set forth in assignment of Error, B., ante page .

We are thus brought face to face with the far famed law of Toro and the case of Bein *vs.* Heath, 6 How. 229. To the learning of Mr. Eustis therein, nothing need be added. The case shows most clearly the reason and the object of the Act of Louisiana in permitting the Wife to mortgage her separate property, and the provisions of this Act are now embodied in La. Code, in articles 126, 127 and 128.

It is not claimed that there is anything wrong or informal in the proceedings by which the wife mortgaged her paraphernal property. Under the law authorizing the mortgage, the notarial act is made just as binding as if the mortgage had been made by a *femme sole*. Any person, therefore, as a *bona fide* holder of the wife's note bearing special mortgage could validly pledge it as security for money loaned by the Insurance Company. The wife can have no greater rights against her husband than against any other pledgor under such circumstances. She could not get back the pledge without paying the money advanced npon it. No *femme sole* could repudiate her obligation in such a case. And the Judge's *instruction* to the jury *actually defeats and annuls the statute*, which relieves the creditor from the burden of proving that the money advanced enured to the benefit of the Wife's separate property. The transaction in its incipiency was, therefore, free from all legitimate attack. It remained so from about June 1873, until January 3, 1874,

upon which date the interest upon the note had been paid, when the note again fell due for its face, to-wit:-$5,000., and was extended one year from that date, without novation. Rec. p. 14, 15. It is not pleaded that before this date or at any other time there was anything *contra legem* in the transaction: the Insurance Company advanced their money on the faith of the collateral; the husband by virtue of his possession (the possession of a *femme sole's* note) had the right to pledge it, and in the various capacities of Agent, Head of the Community and Administrator of the property mortgaged, had authority to receive the money. With full knowledge on that January 3, 1874, of all the circumstances, and as a *femme sole*, she voluntarily consented to the extension of one year; the only conflict in the evidence was about the payment of interest. She alleges that this consent to the extension of her mortgage note for one year was signed by her "under the pressing solicitations of the officers "of the Merchants Insurance Company and under the "controlling influence of her husband," and therefore she is not liable on said note.

What is the legal effect of this extension?

Assuming that the husband was without authority to dispose of the Wife's note, which appears a very extravagant assumption, she cannot deny that she had full knowledge of all the material facts; nothing was suppressed or unknown, when she consented to the renewal of the mortgage note for another year. If the husband exceeds his authority, she knowing the fact, must exercise her election. That she acted under marital influence or the persuasion of the officers of the Insurance Company, does not in any way weaken the effect of her ratification; for she was ratifying the act of a *femme sole*.

But on October 30, 1879, by act before James Fahey, Notary Public, and assisted by her husband, she acknowledged, confirmed and ratified in the most public manner possible, her indebtedness on the note, and that it "and the mortgage securing its payment "shall be and remain unimpaired and in full force and "effect until the payment of the above sum of Five "Thousand Dollars, shall have been effected." This act is equivalent to, nay, in express terms is a confession of judgment by the Wife. It is "full proof of "the agreement contained in it against the contracting

"parties and their heirs or assigns, unless it be de-
"clared and proved a forgery." La. Code, 2233-2236. It cannot, therefore, be contradicted by parol.

Owings *vs.* Hall, 9 Peters, 607.

V.

If it be now asked how the lower Judge came to admit the Single Witness, the wife herself, the only party interested as Defendant herein, to overthrow her own solemn obligation as a *femme sole* repeatedly acknowledged in due form of law and without any allegation of fraud on the part of her husband, and to annul an authentic act without allegation and proof that it is a forgery, the answer must be, and it can in no other way be legally justified, referring to Louisiana Code, 2398-2412 before cited, because the Wife was made by her transaction the security for her husband's debts. But the answer to this is manifold. *First*, "Presump-
"tions, not established by law, are left to the judg-
"ment and discretion of the judge, who ought to admit
"none but weighty, precise and consistent presump-
"tions, and only in cases where the law admits testi-
"monial proof, unless the act be attacked on account
"of fraud or deceit." L. C. 2267, 2288. Manning *vs.* Insurance Co., 100 U. S. 693, 698. Badillo *vs.* Tio, 6 La. An. 129. *Second*, After the renunciation of all the laws made for her benefit and procuring the assent of the judge and the authority of her husband, she issued the note to her husband to be negotiated by him in any way he pleased. If the Insurance Company obtained the note *bona fide*, in the first place, paying for it *a full consideration* in money, the wife could never say that the laws made for her benefit still existed in full force and vigor; for she had declared in her authentic act of mortgage "that she does by these
"presents mortgage, effect and specially hypothecate
"in favor of the said T. Bienvenu and to enure to
"the use and benefit of any and all future holder or
"holders of the said notes, etc." She admits she entrusted the note to her husband and that he passed it to the insurance company. Could the authentic act of mortgage be good, and her notes void? Hardly! She, so far as these notes are concerned, became by this notarial act a *femme sole* and renounced thereby the benefit of the law made expressly for her, by virtue of a special statute enacted for this very purpose. The validity of the notes, no matter in whose hands,

could never thereafter be contested on the ground that the price paid for them did not enure to her benefit. The husband, dealing with the insurance company, was not the holder in law of the note of his *wife* but the note of a *widow* or *spinster*. If the latter could not complain of the Banker to whom her Agent had pledged or discounted the note and used the proceeds for his own purposes, neither can the former. The Act, "when executed as herein provided for, shall "furnish full proof against her and her heirs, and be "as binding in law and equity in all Courts of this State "and have the same effect as if made by a *femme sole*." Any interpretation of this statute which would make it a snare, would be clearly inadmissible.

The position of the Assignee and Insurance Company is almost identical with that of the Bank and the mortgagee in Fortier vs. Bank, 112 U. S. 439. There, the check for the proceeds of the discount $5,975, was paid by the Assignor of the Wife's note to the Bank in "his check * * payable to her order; that after "Mrs. Fortier received the check it was deposited by "Mr. Fortier, with her endorsement, to his own credit "in the Louisiana National Bank, and the deposit was "drawn out from time to time thereafter on his checks. "* * * She, (the wife) testified that she received no "money from Godchaux on the loan made by him, "and that she did not receive any money on his check, "which she admitted was endorsed by her, and that "none of the money loaned was used for her separate "benefit." Was this endorsement of her check and the subsequent endorsement by the husband a violation of Art. 2398-2412, of the La. Code? It appears to us totally inapplicable to that, as well as to the instant case. It is impossible to see in the facts proved any violation of a prohibitory law. "We cannot see why "Wives should not, under such circumstances, be held "to the same rules with other persons, who consent to "the sale of their property by another."

Delacroix *vs.* Nolan, 7 La. An. 682.

In conclusion, our reliance is on the Statute of 1855, p. 308, embodied in La Rev. Statute, of 1870, and La. Code of 1870, Articles 126, 127 and 128 above referred to and the interpretation heretofore placed upon them both by the Courts of Louisiana and by this Court.

Respectfully submitted.

CHARLES W. HORNOR,
GEORGE A. KING,
For Plaintiff in Error.

Supreme Court U. S.
FILED.
DEC 16 1887
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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 1077.

ALFRED MARCHAND, PLAINTIFF IN ERROR,

versus

JOSEPHINE A. LIVAUDAIS, WIFE OF CHAS. LAFITTE, DEFENDANT IN ERROR.

Error to the U. S. Circuit Court for the E. D. of La.

MOTION TO DISMISS.

Now comes Josephine A. Livaudais, wife of Chas. Lafitte, made sole defendant in the writ of error prosecuted in this cause by Alfred Marchand, plaintiff in error, and moves that this Honorable Court do dismiss the said writ of error, because that her husband, Chas. Lafitte, made defendant in the Circuit Court, has not been made a party to the said writ of error, he being by law a necessary party thereto.

And upon this motion the said Josephine A. Livaudais prays the judgment of this Honorable Court.

EDGAR H. FARRAR,
ERNEST B. KRUTTSCHNITT,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

No. 1,077.—October Term, 1887-'8.

ALFRED MARCHAND, *Plaintiff in Error,*

vs.

Mrs. CHARLES LAFITTE.

On motion of W. S. Benedict and C. W. Hornor, attorneys for plaintiff in error, leave is now granted to file herein the proceedings in the lower court, since the refusal of the motion to dismiss in this court, citing the husband of the defendant in error, Charles Fafitte, to appear and show cause, &c., in this case, as therein set forth, without prejudice.

And if this relief cannot be granted, motioner prays that the citation herein be taken and adopted by this Honorable Court as a notice to the husband, Charles Lafitte, to come into this Honorable Court to aid and assist his wife, the defendant in error.

And should this Honorable Court be of opinion that this relief cannot be granted, motioner prays for an order from this Honorable Court authorizing Charles Lafitte to aid and assist his wife in her defence to this writ of error.

W. S. BENEDICT,
C. W. HORNOR.

ALFRED MARCHAND *vs.* Mrs. CHARLES LAFITTE. } U. S. Circuit Court. No. 11,482.

The petition of Alfred Marchand, plaintiff, with respect, shows: That heretofore, to wit, on the day of , 1887, on a final judgment rendered against him in the above entitled and numbered cause, and at the same term thereof, and in open Court, he applied for a writ of error from said final decree to the Honorable the Supreme Court of the United States, and gave bond with security approved by the Court for such writ, returnable to said tribunal on the first day of its next term, viz: the October term of 1887, and which term is still in session, and duly

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Supreme Court of the United States.

No. 1077.

October Term, 1887.

ALFRED MARCHAND, Plaintiff in Error,

versus

MRS. CHARLES LAFITTE.

Brief for Plaintiff in Error on Motion to Dismiss.

The sole ground urged for a dismissal is that the defendant's husband, made a party in the lower Court to aid and assist his wife in her defence under Article 118, Louisiana Code of Practice, has not been made a party to the writ of error.

The suit below was brought to recover on one of a series of three notes bearing mortgage, drawn by Mrs. Lafitte *under judicial authority*, to contract the debt which the notes evidenced, and to secure them by a a mortgage on her separate property. When duly executed in conformity to the Louisiana Statute, "the act "shall furnish full proof against her and her heirs, and "be as binding in law and equity in all courts of this "State and have the same effect as if made by a

"*femme sole.*" See Revised Statutes La., 1870, p. 481, Sections 2432, 2433, 2434. La. Code of 1870, Articles 126, 127, 128.

Fortier vs. New Orleans Bank, 112 U. S., 439.

This statute governs the case. It constitutes the married woman *a femme sole.* Under it, so far from being "an absolutely necessary party to the suit," the husband's authorization to his wife to defend, was absolutely needless; he had nothing whatever to do with the suit; *he is without interest.*

Stewart vs. Boyle, 23d Annual, La., p. 83.

When Marchand, in the lower Court cited both husband and wife, and when Charles Lafitte wrote, Rec., p. 23: "December 6, 1886, I authorize my wife, the defendant herein, to file the foregoing answer and to defend this suit to final judgment," no one was hurt and no one was benefited. *Utile per inutile non vitiatur. Lo que abunda no dana.* The authorities quoted by the motioner are not cases under the special statute above quoted, and are, therefore, irrelevant. *Cessat ratione juris, cessat et ipsa lex.*

But *a. g.* suppose we are wrong in this, and that the jurisprudence of Louisiana differs from that of all the other States, in requiring in such cases as this, the husband to be made a party both in the lower Federal Court as well as here, what kind of a fault is it that Marchand has fallen into? And is it fatal to your appellate jurisdiction, and must the writ of error be dismissed? Hardly! The case would even then seem to come under the discretion of the Court. R. S., U. S. 1005.

Gumbel vs. Pitkin, 113 U. S., 545, and cases there cited.

It is also submitted that if, in fact, in cases like this, the wife does require the authority of her husband or of the judge to defend in this Court—which is denied—and if the authorization of her husband in the lower Court is inadequate to the defense here—which is also denied—in what manner has she now become a *femme sole* here in her capacity as motioner in this motion to dismiss? It is not denied that in making this motion, her husband might possibly aid and assist her and thus confer upon her the *jus standi in judicio;* and if he refused, your Honors might bestow on her the same authorization. But this power necessarily includes the granting of the like relief to the plaintiff in error. If we are to blame for not making the motioner's husband a party to our writ of error, how much greater is her fault for not making him a party to this motion! Especially where he has in the lower Court authorized his wife to *defend* to *final* judgment.

Fairex vs. Bier, 37 Annual, 821.

It is also a fact that the appearance of counsel in this Court on this writ of error is not a special or *de bene esse* appearance. This appears to admit of but one construction—both wife and husband are now before the Court.

We pray the motion may be denied.

C. W. HORNOR,
W. S. BENEDICT,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
DEC 19 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

ALFRED MARCHAND,
PLAINTIFF IN ERROR,

v.

JOSEPHINE ADELE LIVAUDAIS, WIFE OF CHARLES LAFITTE.

No. 124.

ASSIGNMENTS OF ERROR.

The plaintiff in error begs leave to submit the following assignments of error. They are the same as those set out in our brief, but in clearer consecutive form.

I.

The court below erred in admitting the testimony of the wife in support of the defence, after the case of the plaintiff had been closed. The wife was called as a witness in her own behalf to prove that she never issued the note in question to any other person than her husband; that she never received any benefit from the same, either to herself or to her estate; that she administered her paraphernal property separate and apart from her husband;

that of the three notes given to secure the common mortgage sued upon here she had issued two and had received the amount of the same, to wit, $10,000, which she had used for the benefit of her separate paraphernal property; that she made the mortgage for $15,000 with the expectation of making repairs and improvements upon the separate paraphernal property; but that she had never used the third note and never issued it except to her said husband.

The objection was that the law did not permit her under the allegations of her answer to contradict her affidavit under which she was authorized to effect the loan on her separate property set forth in the act of mortgage; that the allegations of her answer—*as she had not pleaded fraud*—did not permit her in connection with the acquisition of the said note by the said Insurance Company to introduce evidence as against her written act and her notarial acts concerning the ownership of said notes; that the allegations of the answer, in the absence of any allegation of fraud, did not enable her to introduce any evidence to prove any want of original consideration for the said note. All this was overruled, and the defendant allowed to testify. (See Bill of Exceptions, No. 1, pp. 14, 15, 16.)

II.

The court below erred in charging the jury as follows: "that since the assignor of plaintiff had acquired the note sued on after maturity from the husband of defendant as collateral security for a loan made to him personally, and distinct from any property of his wife, the defendant, and inasmuch as the note in suit was on its face the note of a married woman, the jury were at liberty to consider the question whether the defendant had ever received any

consideration for the said note, and whether the defendant had ever issued the same; that under the laws of Louisiana, though there was an authorization by a judge, if, as a matter of fact, the person taking the note of a married woman made the advance directly to the husband and knew the advance was made to him, the wife would not be bound for the note, nor would her property; that the statements of the husband made to the assignor of the plaintiff unless authorized by the defendant, did not bind her, and that the defendant was not estopped from proving the facts to which she herself testified, as set forth in the offer to prove referred to in Bill of Exceptions No. 1, and if they found from the evidence as a fact that the note in suit had never been issued by the defendant until she delivered it to her husband; that it was passed to the assignor of the plaintiff after maturity, and upon its face was the note of a married woman, and the plaintiff knew that the loan was made to the defendant's husband for his benefit and not for hers, and delivered the money to him; that the defendant received no part of it, that then their verdict must be for defendant."

Bill of Exceptions No. 2, pp. 16, 17.

III.

And the court also erred in refusing to charge as requested:

1. That parol evidence was not admissible to show that the money borrowed on the note made by a married woman under proper judicial authority was received and used by the husband for his own personal use, there being no allegation of fraud or bad faith.

2. That when the wife represents to the judge in her application for leave to borrow money that she requires a

certain sum, and in order to enable her to realize the same she gave a mortgage on her separate property, and he grants such authority, she is bound by the act of mortgage, after the same leaves her possession or control, whether through her husband or otherwise, in the absence of any and all allegations that said notes were obtained by fraud or ill practices on the part of the husband or subsequent holder through him.

3. That whereas in this case the wife has not specially pleaded fraud in the obtaining of said notes by the insurance company or its assignee, the plaintiff, and has been the sole and only witness on her own behalf, such evidence having been objected to ought to be excluded from the consideration of the jury; and if it be considered by them at all, should be considered insufficient in and of itself to authorize her to be released from her obligation on said notes; that it having been shown that the husband conducted the affairs of his wife relative to her separate property, and it being shown that the wife in good faith gave to her husband the note herein sued upon for the purpose of realizing funds in the event that the same should be needed, and having been benefited thereby, she is precluded under the law from attacking the rights of the holders of the said notes, who in good faith have parted with their money upon representations made by her under oath to the proper judge to make the note and mortgage to secure the same, after she has shown that the note was voluntarily given by her to her said husband and for the uses and purposes which she testified and expressed as necessary for the benefit of his business thereafter.

4. That the defendant is estopped by her admissions in the act of acknowledgment of October 30, 1879, from attacking the ownership of the Insurance Company and its president, Paul Fourchy, in and to said notes; that the

acts of her husband in paying the interest thereon to that date, her own acts in extending the payment of that note to a future date, or the subsequent acts of her said husband, done in like manner and form, in paying interest on said note thereafter to August 25, 1885, or of setting up no defence of want of consideration thereafter, without any defence being pleaded of coercion on the part of the husband, and his acts in the premises are her acts, she having recognized by said acknowledgment of October 30, 1879, his authority as her agent.

5. That the act of the wife in endeavoring to obtain money for herself, her husband, or her family, by a mortgage of her paraphernal property, by and under due and proper authority of the laws of the State of Louisiana, with the consent of the husband, is binding upon her. She cannot be permitted, when by reason of her own acts she or her husband has received the full consideration of the note declared upon herein, which went either to her own separate use and benefit or that of the community, or be permitted, without an allegation of fraud and knowledge on the part of the insurance company or its assignee, after having received full consideration of the insurance company and assignee and profited thereby, and to injure them or either of them in her own interest.

Bill of Exceptions No. 3, pp. 17, 18.

IV.

And the court also erred in charging the jury (pp. 18, 19)—

"That the issues upon the evidence which has been introduced in the cause were such as had been stated by the court to the jury in its general instructions, which are specially set forth in Bill of Exceptions No. 2, and in-

structed the jury that if they found the issuing of the note by the defendant to have been merely to her husband and that the party taking the same, the assignor of the plaintiff, knew that it was the note of a married woman, and that the consideration which her husband was receiving therefor was a consideration for himself, and not in any respect for her estate, and in fact neither the defendant nor her estate was benefited by the loan made her husband, and that she received no part of the money arising therefrom, that then their verdict must be for the defendant."

STATUTES OF LOUISIANA RELATING TO LOANS TO MARRIED WOMEN.

As these statutes—constituting Arts. 126, 127, and 128 of the Revised Code of Louisiana—are quoted in full in the opinion of the Court in *Fortier* v. *New Orleans Bank*, 112 U. S., 439, 446, 447, they were not set out *in extenso* in our brief. In order fully to comply with the rule, however, we now set them out in full, as follows:

"ARTICLE 126. A married woman over the age of twenty-one years may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and, to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

"ARTICLE 127. In carrying out the power to borrow money, or contract debts, the wife, in order to bind herself, or her paraphernal, or dotal property, must, according to the amount involved, be examined at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either the one or the other are for her husband's debts, or for his separate benefit or advantage, or for the benefit of his separate estate or of the community, the said judge shall not give his sanction authorizing

the wife to perform the acts or incur the liabilities set forth in Article 126.

"ARTICLE 128. If the wife shall satisfy the judge that the money about to be borrowed or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by Article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all the courts of this State and have the same effect as if made by a *femme sole*."

CHARLES W. HORNOR,
GEORGE A. KING,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 124.

ALFRED MARCHAND, PLAINTIFF IN ERROR,

vs.

JOSEPHINE ADELE LIVAUDAIS, WIFE OF CHARLES LAFITTE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIFTH CIRCUIT, EASTERN DISTRICT OF LOUISIANA.

Brief for Defendant in Error.

EDGAR H. FARRAR,
ERNEST B. KRUTTSCHNITT,
B. F. JONAS,
Counsel for Defendant in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIFTH CIRCUIT, EASTERN DISTRICT OF LOUISIANA.

Brief for Defendant in Error.

STATEMENT OF CASE.

In January, 1868, Josephine Adele Livaudais, wife of Charles Lafitte, owning in her own right certain real estate in the city of New Orleans, executed to Placide Bienvenu a mortgage thereon before Cuvillier, notary, for fifteen thousand dollars, represented by three notes of five thousand dol-

lars each, to her own order and by her endorsed, all due January 1, 1869, bearing 8 per cent. per annum interest from maturity until paid (Record, pp. 4, 5, and 6). This mortgage was executed by authority of the husband and with the authorization of the judge, as provided in articles 126, 127, and 128 of the Revised Civil Code. Only one of these notes is at issue in this case.

In June, 1873, nearly five years after one of these notes was due, Charles Lafitte, the husband of the defendant, obtained a loan of $5,000 upon his own individual note from the Merchants' Mutual Insurance Company, of which company he was then a director, and as collateral security for this loan pledged the long-past due note of his wife (Record, p. 14). At the time this pledge was made there were no endorsements or entries of any kind on the note. (See copy of original note, Record, p. 213.) The wife had never issued this note to any one but her husband. Neither she nor her estate had ever received any consideration therefor whatever. She had obtained authority to borrow fifteen thousand dollars to make repairs and improvements on her separate paraphernal property, but she had only used two of the notes for that purpose, and the third note she never used, and never issued it except to her husband, without consideration. (Record, pp. 15 and 16.)

On January 3, 1874, the very day on which this note would have been barred by the statute of limitations, the Merchants' Mutual Insurance Company, holder of this wife's note as collateral security, presented the same to her for renewal. There was conflict of evidence as to what was assented to at that time by the wife. (Record, p. 15.)

The husband, Charles Lafitte, went on making payments

on this note, from time to time, up to October 22, 1879, at which time the insurance company demanded payment of the note and threatened suit on the same. This threat was made to the husband and by him communicated to his wife. (Record, p. 15.)

Eight days later, on October 30th, the defendant wife, with the authorization of her husband, *but without the authorization of the court*, executed before Fahey, notary, another mortgage to Paul Fourchy (president of the said insurance company) on the same property, and executed an additional note of $5,000, payable January 15, 1881, with 8 per cent. interest from maturity until paid. This act recites that Fourchy is the holder of the original note, and that the new note is not a novation of it, but merely an accommodation to Fourchy to furnish him a note negotiable in form, and issued by the wife in consideration of the extension of her original note to January 15, 1881.

The wife appears to have had no further connection with the matter until more than five years after this last transaction, when the statute of limitations had long since accrued on both notes, at which time, September, 1886, being desirous of selling her property, she offered, as a compromise and with a denial of any liability on the notes, to pay the insurance company a sum to surrender the notes and cancel the mortgage. (Record, p. 15.)

On October 9th, thereafter, the insurance company sold the note to the plaintiff, who knew all the facts with reference to the history of the note. (Record, p. 15.)

On November 23, 1886, the plaintiff, reserving his mortgage rights, declared on these two notes as representing one

indebtedness of $5,000, and averring that all interest had been paid up to August 25, 1885. (Record, pp. 1 and 2.)

The defendant answered, denying any liability on the notes, and averring that she had received no consideration therefor; that the insurance company had received the original note from her husband; that the renewal endorsed thereon in 1874 was signed by her under the pressing solicitation of the officers of the insurance company and under the controlling influence of her husband; that the note and mortgage of October, 1879, passed before Fahey, were also signed under the same influences; that when her signatures of 1874 and 1879 were given the insurance company and its officers well knew that she was not liable on the notes aforesaid, and that she had never received any consideration therefor; that, although she had yielded to the demand to endorse said notes, she had notified the insurance company at the date of her signature that she would never pay the same, because she did not owe; that the said company was still the owner of the notes, or, if not, that the plaintiff had taken them after maturity and at a very recent date, and therefore had no greater rights than the insurance company; that no demand had been made upon her relative to said notes since October, 1879; that no payments had been made upon the same, either of interest or principal, by her, and that they were barred by the prescription of five years, which she specially pleads.

Further answering, she avers that the notes were issued by the husband for his own use and benefit, and not for her separate use and benefit; that no part of the consideration received by her husband therefor in any manner enured to her benefit; that, though issued in her name, the notes

really constituted an obligation of the husband, who had extinguished the same by payment.

She then assumes the position of a plaintiff in reconvention and avers affirmatively that she never received any consideration for the notes sued on; that if any consideration was ever given therefor it did not enure to her benefit; that the notes are prescribed on their face, and the mortgage recited in the acts is extinguished and should be cancelled.

She prays that the plaintiff's demand be rejected; and, as plaintiff in reconvention, prays that she may have a judgment against the plaintiff decreeing that she is not liable on the notes; that they are not her legal obligations; that they are barred by limitation, and that the notes and inscriptions of mortgage in the mortgage office of the acts of January 15, 1868, and October 30, 1879, be cancelled and erased.

On these issues the parties went to trial, which resulted in a verdict for the defendant and sustaining her reconventional demand. (Record, p. 13.)

Judgment was entered in accordance with the verdict. (Record, p. 19.)

During the trial the plaintiff reserved three bills of exception.

1st. To allowing the parol evidence of the wife to show the averments of her answer relative to the issuance of the notes and want of consideration to her.

2d. To the charge of the judge to the jury relative to the wife's obligation on the notes, and to each proposition contained in it.

3d. To the refusal of the court to give a string of instructions asked for on suppositious issues, the court stating to the jury that the issues on the evidence had been stated to the jury in its general instructions set forth in bill No. 2.

Argument.

I.

Before taking up the questions raised by the assignment of errors, we submit that on the face of the record they are purely moot questions, the decision of which one way or the other cannot affect the verdict and judgment rendered below.

One of the principal issues, both in the defense to the plaintiff's demand and in the demand in reconvention, is the statute of limitations, or prescription as it is termed in the civil law.

Article 3540, Civil Code, provides:

"Actions on bills of exchange, notes payable to order or bearer, except bank notes, and those on all effects negotiable or transferable by endorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements are payable."

As appears by the act of October 30, 1879, both notes were made payable January 15, 1881. (Record, p. 8.)

They therefore became barred (allowing days of grace) on January 5, 1886.

Bill of exceptions No. 1 (Record, pp. 14 and 15) shows all the proof adduced by plaintiff to overcome the peremptory plea of the defendant, that the notes and mortgage

were barred on their face, that no demand had ever been made on the defendant for the notes since October, 1879, and that no payments had been made thereon by her, either of principal or interest.

From that bill and the exhibits made part of plaintiff's petition it appears that on the original note of January 15, 1868, no payments of any kind were ever made, and that on the note of October 30, 1879, the payments were all made by Charles Lafitte, the husband of the defendant, who had given it as collateral to his own individual note.

It does not appear by the said bill that any of said payments made by Charles Lafitte ever proceeded from the wife, directly or indirectly, or that they were made with her consent or authority.

It does not appear that any demand was made upon the wife to pay said note from October 30, 1879, to November 23, 1886, the date when this suit was brought, or that she ever made any promise to pay the same.

It does appear that in September, 1886, eight months after prescription had accrued, the wife offered as a compromise, *accompanied with a denial of liability*, to pay a sum of money to have the notes and mortgage cancelled in order that she might sell her property unencumbered.

No bill of exceptions is here relating to any charge given by the court on the subject of the prescription pleaded by the defendant.

The presumption is therefore conclusive that all such charges were right.

The notes were barred on their face at the time the action was filed.

When the defendant pleaded the bar it was incumbent on

the plaintiff to show affirmatively that the apparently accomplished prescription had been interrupted by acknowledgments or by payments either of principal or of interest.

This he utterly failed to do, because it is too clear for discussion that an offer to pay a sum as a compromise, *accompanied by a denial of liability*, is not an acknowledgment sufficient to take a debt out of an accrued prescription (Civil Code, art. 3520). It is equally clear that payments made by a third person with his own money, in reduction of his own debt, without any power or authority from the defendant, is not a payment by her which imports acknowledgment.

It thus appears that there is on the record and was in issue below a clear defense to the plaintiff's whole action, entirely independent of the questions raised by the bills of exception.

This defense appears on the face of the papers to be entirely made out. It is a peremptory bar to the demand, even if there were originally liability on the notes. Article 3528 of the Civil Code declares that—

"The prescription which operates a release from debts discharges the debtor by the mere silence of the creditor during the time fixed by law from all actions, real or personal, which might be brought against him."

No assignment of errors on the record covers this independent and determining defense.

Under these circumstances we submit that this Court will refuse to consider the errors assigned, because they could have no effect on the verdict.

To render an exception taken below available in this

Court, it must appear that the ruling affected the decision of the case.

R. R. Co. *vs.* Smith, 21 Wall., 261.
Packet Co. *vs.* Clough, 20 Wall., 542.

An error by which the appellant or the plaintiff in error could not have been injured is no ground for a reversal.

Blackwell *vs.* Patten, 7th Cranch, 471.
Campbell *vs.* Pratt, 2 Pet., 354.
Greenleaf *vs.* Birth, 5 Pet., 132.
McMecken *vs.* Webb, 6 How., 292.
Chandler *vs.* Von Roeder, 24 How., 224.
Grand Chute *vs.* Winegar, 15 Wall., 355.

An error, for instance, in the charge which could not have affected the verdict does not warrant a reversal.

Cavazos *vs.* Trevino, 6 Wall., 773.
Philpot *vs.* Gruninger, 14 Wall., 570.
Chicago, &c., R'y Co. *vs.* Ross, 112 U. S., 377.

It is true that, in making this point, the burden of proof is on us to show beyond question that the alleged errors worked no injury to the complaining party.

Deery *vs.* Cray, 5 Wall., 597.
Smith *vs.* Shoemaker, 17 Wall., 630.

But we believe that we have complied with this obligation and shown that the defense of prescription was conclusive and unanswerable, and that the verdict was responsive to this issue as well as the other.

II.

The first assignment of errors is that the parol testimony of the wife to show want of consideration should not have

been admitted under the pleadings, after the plaintiff had shown the state of facts set up in the bill.

The gist of the objection is twofold: 1*st*, that the answer does not aver "*fraud*," and, 2*d*, that in the absence of such an averment of fraud *parol testimony* is not admissible to prove want of consideration.

First. It is true that the answer does not contain the word "fraud," but it contains all the averments necessary to constitute the attempt of the plaintiff to bind the wife—an act *in fraudem legis.*

Art. 2398 of the Civil Code declares—

"The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

This article is the form in which the code has placed the 61st Law of Toro, which was in force in Louisiana under the Spanish dominion. (Durnford *vs.* Gross, 7th Martin, p. 488.)

It has been uniformly construed to be a *prohibitory law.*

Barnes *vs.* Burbridge, 15 A., 628.
Barth *vs.* Kasa, 30 A., 940.
Claverie *vs.* Gerodias, *ibid.*, 291.
Hall *vs.* Wyche, 31 A., 734.
Chaffe *vs.* Oliver, 33 A., 1010.
Harang *vs.* Blanc, 34 A., 635.
Fortier *vs.* N. O. Bank, 112 U. S., 439.

In all of the above cases the court has spoken of any attempt to hold the wife for the husband's debt as *in fraudem legis,* and in none of them has there been any further plead-

ing of "fraud" than to aver the facts and the complicity of the creditor.

There is nothing sacramental in the word "fraud." It is a mere epithet applied to facts, or to a conclusion drawn from facts. The good pleader states the facts and leaves the epithets out.

What the law prohibits is legally wrong, and he who acts under the forms of law to reach a forbidden result is, in legal parlance, acting *fraudulently*.

Second. The above-quoted authorities conclusively show that, in a case like this, where the plaintiff admitted and proved that he received the wife's note, long past due on its face, from the husband as security for his individual debt, parol or any other sort of evidence is admissible to show want of consideration to the wife's separate estate.

In Chaffe *vs.* Oliver, 30 A., p. 1010, Mr. Justice Fenner says:

"If the evidence (parol evidence objected to) was properly received and is entitled to consideration, it is obvious that the transactions recited were, from beginning to end, a mere contrivance to which all the parties were knowingly privy, by which the wife and her property were to be bound for her husband's debts, in violation of the prohibition of article 2398 of the Civil Code. It is settled, to epitomize our jurisprudence, that such transactions cannot be sustained; that the wife and her legal representatives cannot be bound thereby; that she may attack and annul them or may defend against them; that she is not estopped by her own acts in aid of the transactions, which are presumed to be done under marital influence; that whatever the form of the contract, its true character may be inquired into and laid bare, *and that in her assault even upon authentic acts she is not con-*

fined to counter-letters and interrogatories on facts and articles, but may resort to parol evidence to establish their true nature and purpose.

"Of course, these doctrines have their limitations when they involve the rights of innocent third parties who have acted in good faith upon the apparent validity of such transactions."

And so in Barth *vs.* Kasa, 30 A., 940, the court say:

"It is not, then, the form of the evidence of the debt which controls the matter of proof and the means of evidence. It is the disability of the party, the wife, under the law to enter into the contract '*in fraudem legis*.' The legal effect of the statute under consideration (act of 1855, now acts 126, 127, and 128, Civil Code) is to shift the burden of proof where it is complied with, *and not the means or character of evidence.* If, indeed, the debt for which the note and mortgage were given was that of the husband, it was '*in fraudem legis*,' and may be shown *by any competent evidence.*"

The language above quoted from Chaffe *vs.* Oliver was reiterated word for word in Harang *vs.* Blanc, 34 A., 635.

We are not here dealing with a creditor who advanced his money to a wife on the faith of a judicial authorization or who took her paper, so issued, before maturity; but, as stated on the face of the bill, we are dealing with a creditor who took a past-due, almost prescribed, note signed by a wife, from the husband as security for the husband's own debt. The fact that the husband said, at the time he presented the wife's note, that interest had been paid on the same up to January 4, 1874, did not change the character of the note nor make any new contract for the wife.

The holder of a note, past due on its face, cannot

change the obligation of the maker by any verbal statements, untrue in fact, he may make to the person to whom he passes it. The maker can be bound only by his own acts and contracts.

Third. It appearing on the bill that the plaintiff admitted and proved that the insurance company had taken the wife's note after maturity, the wife was at liberty, under the general rules of the commercial law, to prove that no consideration for the note passed between her and her husband.

We need not quote authority for this elementary proposition in this Court.

The note of the wife, secured by an act of mortgage authorized by a judge, did not make the note purport an obligation on her part in anybody's hands after maturity. The whole effect of the authorization of the judge was merely to change the burden of proof as to obligation on the note, and to place a wife's note, so issued, on the same plane with the note of a person *sui juris*. This Court has reviewed the Louisiana jurisprudence on this question, and came to the conclusion stated above.

Fortier *vs.* New Orleans Bank, 112 U. S., pp. 446–'7.

III.

The second assignment of error is based on the second and third bills of exceptions.

These bills are totally defective and cannot be considered in this Court.

First. They both fail to state any facts, or to set forth so much of the evidence as tends to prove the facts out of which

the questions are raised, and they are consequently nothing more than a statement of instructions given and refused.

Worthington *vs.* Mason, 101 U. S., 149.
Russell *vs.* Ely, 2 Black, 576.
Jones *vs.* Buckell, 104 U. S., 554.

Second. They are exceptions to a series of propositions in the mass, and cannot be considered if any one of them be sound.

Mouler *vs.* Am. Life Ins. Co., 111 U. S., 355.

IV.

Apart from these objections, it is clear that that the charge of the court set forth in bill No. 2 was correct, assuming the facts to be as shown in bill No. 1.

The first proposition contained in the charge is that, as the assignor of the plaintiff had acquired the note sued on *after maturity* from the husband as collateral security for a loan made to him personally, and distinct from any property of his wife, and inasmuch as the note so taken was, on its face, the note of a married woman, the jury were at liberty to consider the question as to whether the defendant had ever received any consideration for the note and whether she had ever issued the same.

There is certainly no error in that proposition. Even if it were not, on its face, a wife's note in the hands of a husband, borrowing money on it for his own purposes, the bare fact that it was past due at the time the insurance company got it would open the door wide as between the maker of the note and the insurance company to show want of consideration.

The second proposition is that under the laws of Louisiana, though there was an authorization by a judge, if, as a matter of fact, the person taking the note of a married woman made the advance directly to the husband, and knew that the advance was made to him, the wife would not be bound for the note, nor would her property be so bound.

It is idle to discuss the correctness of this proposition, in view of the prohibition contained in the article 2398, Civil Code, and the authorities quoted above.

The third proposition is that the statements of the husband made to the assignor of the plaintiff, unless authorized by the defendant, did not bind her.

What these statements are does not appear, and here becomes apparent the gross defect in the bill in not stating such parts of the evidence as was relevant to the bill. If we can go back to bill No. 1, the only statement the husband made to the assignor of the plaintiff was the false statement that interest had been paid on his wife's note to January 4, 1874. We have already demonstrated that the wife cannot be bound by that statement unless authorized by her, and that is the limitation imposed by the charge. The counsel says in his brief that "the husband was manifestly the agent of his wife." The law does not make him such. The record does not state that he was such in fact. How, then, could he become such? As head of the community, he has nothing to do with her affairs, except to enjoy the revenue, for the benefit of the community, of the paraphernal property, provided she does not administer her paraphernal property herself (which the record shows she did), in which event its revenues do not fall into the community. (C. C., Arts. 2384, '5, '6.

Nothing that the husband can do can bind his wife's separate estate. Except as stated above, it is as far beyond his control and authority as the estate of a third person. He may, *as a matter of fact*, be her agent; but this fact must be established like any other fact, and cannot be presumed.

Under the charge of the court, if there were anything to show that the statements were made with the authority of the wife, it was the duty of the jury to find that the wife was bound. But the jury found otherwise; and this finding must have been correct, as no complaint was made, by motion for a new trial, that the verdict was contrary to the law and the evidence.

The fourth proposition was that the defendant was not estopped from proving the facts to which she herself testified, as set forth in bill of exceptions No. 1.

We support this proposition by a quotation from the opinion in Harang *vs.* Blanc, 34 A., p. 635:

"It is also urged that the plaintiff is estopped by reason of her conveyance to defendant and the declarations made in the acts from denying its truth and seeking its nullity. It has often been held that where a married woman seeks to avoid an act which she attacks upon the ground that it contravenes the provisions of a prohibitory law, designed for her protection against marital influence, the principle of estoppel, as usually recognized, is not applicable."

The fifth proposition was that if the jury found from the evidence as a fact that the note in suit had never been issued by the defendant until she delivered it to her husband, that it was passed to the assignor of the plaintiff after maturity, and upon its face was the note of a married woman, and the

plaintiff knew that the loan was made to the defendant's husband for his benefit and not for hers, and delivered the money to him, and that the defendant received no part of it, then their verdict must be for the defendant.

It is hard to frame a charge that would respond more exactly than this to the prohibition of the Louisiana Code that a wife shall not bind herself or her separate estate for the benefit of her husband or of the community.

If a husband can take his wife's past-due note, for which she never received any consideration, and raise money on it for his separate and individual account, and thus bind the wife, then not only is the above prohibition null, but the wife is even in a worse position than a third person, who could not be bound by any such transaction.

V.

The court refused to give the five instructions asked for by the plaintiff, as shown in bill No. 3, for the reason that the issues upon the evidence which had been introduced in the case were such as had been stated by the court to the jury in its general instructions, specially set forth in bill No. 2. As neither of these bills state any facts, nor any evidence tending to show facts, and as the instructions asked for either assume facts which are not found, or are based upon supposititious issues, none of these exceptions are to be considered. In the absence of facts, the statement of the court that these charges were not responsive to the issues is conclusive in this Court. The presumption is against error.

Wiggins *vs.* Burkham, 10 Wall., 129.

These objections are positively fatal to the third, fourth,

and fifth requests, which are in themselves models of confused statement and gratuitous assumption of facts and conclusions of law and fact.

As to the first request, it is vicious, because it asks the court to charge the jury to ignore testimony which the court had decided, over the objection of the plaintiff, as set forth in bill of exceptions No. 1, to be admissible under the facts therein set forth.

As to the second request, it assumed a state of facts not shown to exist, an interpretation of the pleadings erroneous in character, and it ignores the fact that the plaintiff, who was an assignee after maturity, proved that his assignor acquired the wife's note, after maturity, from her husband as security for the husband's debt. With such issues before the jury, such a charge would have been entirely misleading.

The further charge given by the court, after the refusal of these requests, is but the repetition of the general charge excepted to by bill of exceptions No. 2, the correctness of which we have fully discussed above.

In examining the charges given, their whole scope and bearing must be taken together.

Magniac *vs.* Thompson, 7 Pet., 348.

Congress & Empire Spring Co. *vs.* Edgar, 99 U. S., 645.

VI.

We desire to say a few words in answer to the plaintiff's brief relative to the effect of the act of October 30, 1879, and the note secured thereby.

The act was passed and the note was issued with the authority of the husband only, and without any intervention of the judge.

Under these circumstances the presumption of law is that the wife is not bound, and the burden of proof is on the plaintiff to show affirmatively that the consideration enured to her separate benefit, and that she was not securing her husband's debt.

The 61st Law of Toro declared: "From henceforward it shall not be lawful for the wife to bind herself as security for her husband, although it should be alleged that the debt was converted to her benefit; and we do also order that when the husband and wife shall obligate themselves jointly in one contract, or severally, the wife shall not be bound in anything *unless it shall be proved that the debt was converted to her benefit.*"

This rule remains in force in Louisiana.

Durnford *vs.* Gross, 7th Martin, 488.
Lombard *vs.* Guilliet, 11th Martin, 455.

No matter what the form of the transaction is or the character or strength of the acknowledgments made by the wife are, the burden of proof is not shifted.

Brandly *vs.* Ker, 7 N. S., p. 666.
Davidson *vs.* Stewart, 10 La., p. 146.
Prudhomme *vs.* Edens, 6 Rob., p. 65.
Alling *vs.* Egan, 11 Rob., p. 244.
Erwin *vs.* McCallup, 5 An., p. 173.
Patterson *vs.* Frazer, *ibid.*, p. 586.
Beauregard *vs.* Eimer, 7 A., p. 293.
Bisland *vs.* Provosty, 14 A., p. 170.
Bowles *vs.* Turner, 15 A., p. 353.
Thompson *vs.* Chick, 19 A., 206.
Searls *vs.* Hien, 20 A., 229.
Urquhart *vs.* Bringier, 24 A., p. 95.
Fortier *vs.* New Orleans Bk., 112 U. S., p. 439.

The court very pointedly said in Prudhomme *vs.* Edens, *supra:*

"It is clear that the acknowledgment made by the wife in the instrument itself cannot avail the plaintiff; if it could the protection which the law gives to married women would be nugatory, as good care would be taken to make them subscribe to declarations of this kind in every contract they may join in under the influence of the marital power."

And again, in Patterson & Co. *vs.* Frazer and Wife, *supra:*

"To permit the naked acknowledgment of the wife to bind her without other proof is inconsistent with the spirit and policy of our laws and jurisprudence; the influence of the husband will readily obtain from the wife such a declaration. It would defeat in many cases the protecting spirit of the law if the burden were thrown upon the married woman to prove that the money, professedly loaned to her, was used by the husband, and that the form of the contract, which marital influence had induced her to adopt, was merely a cloak for a violation of the law. It seems more proper to throw the burden of proof upon the creditor, *who knows he is treating with a person whose capacity is limited, and who is legally assimilated to a minor.*"

And again, in Beauregard *vs.* Eimer, *supra:*

"It is a principle which has come down to us from the laws of Spain that he who contracts with a married woman must show affirmatively that the contract turned to her advantage. The only exception under those laws was when the wife renounced in due form the 61st Law of Toro. This exception no longer exists, and proof that the consideration of the contract enured to the separate advantage of the wife is in all cases necessary to destroy the legal presumption that contracts entered into during the marriage jointly by the

husband and wife are the contracts of the husband. It has been frequently held that the acknowledgment of the wife, *in the act of mortgage*, that the money had been borrowed for her separate use, did not dispense the creditor from making that proof. The circumstance of the wife having a separate advantage in the contract is of the essence of the obligation, and must be proved before a recovery can be had upon it."

This Court reviewed all these cases, and laid down the same doctrine in Fortier *vs.* N. O. Bank, *supra.*

In the absence, therefore, of any proof *aliunde* that the note of October, 1879, enured to the separate advantage of the wife, and in the face of the admitted fact that the consideration therefor was the same as that of the original note, which it was intended to supplement without novation, the plaintiff can gain nothing from this note and the act of mortgage securing it, either by way of estoppel or otherwise.

Nobody has been defrauded or deceived by this act. It was made to the insurance company, appearing through its president, who had with its eyes open, possibly with a desire to accommodate its director, the husband, lent that director husband money for his own use on the security of his wife's past-due note. No new value was parted with when the new act was passed. It was drawn out of the wife by the husband and the insurance company by the threat to sue.

As a parting shot to the plaintiff, we desire to add that the case of Bein *vs.* Heath, 6th Howard, 239, quoted by his counsel in his brief with so much satisfaction, is not a correct exposition of the law of Louisiana, and was so declared by the supreme court of Louisiana in the case of Bisland *vs.* Provosty, 14 A., 169.

We believe that there was no error committed on the trial

below against the plaintiff, and ask that the verdict and judgment be affirmed.

Respectfully submitted,

EDGAR H. FARRAR,
ERNEST B. KRUTTSCHNITT,
B. F. JONAS,
Counsel for Defendant in Error.

Supreme Court U. S.
FILED.
DEC 16 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 1077.

ALFRED MARCHAND, PLAINTIFF IN ERROR,

versus

JOSEPHINE A. LIVAUDAIS, WIFE OF CHAS. LAFITTE, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

Statement.

Alfred Marchand, plaintiff in error here, brought an action at law against the defendant, Josephine A. Livaudais, and her husband, Charles Lafitte, declaring upon certain notes alleged to have been executed by Mrs. Lafitte, with the authority and consent of her husband. The husband was an absolutely necessary party to this suit. Article 118 of the Code of Practice

of Louisiana, which is found in Chapter VI of the Code, entitled "Against whom actions may be brought," declares: "That when one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband.

"Should her husband be absent, the plaintiff must demand that she be authorized by the Judge before whom the suit is brought to defend it alone.

"Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the Judge being required."

A verdict and judgment was rendered against the plaintiff, who thereupon sued out a writ of error to this Court, to which writ the wife alone is made a party. She alone is named in the writ as the party defendant. She alone was cited in error, and she alone is named in the bond given to perfect the writ of error.

ARGUMENT.

It was just as necessary to make the husband a party defendant to the writ of error as it was to make him a party defendant on the original record. The wife had no more capacity to stand in judgment alone in the proceedings in error than she had to stand in judgment alone in the proceedings in the Circuit Court. The jurisprudence of the State of Louisiana has for many years been settled to this effect. See

Lanoue vs. Reed, 7 La. p. 112;

Wells vs. Scott, 10 La. p. 401;

Laurence vs. Burris, 12 An. 843.

As the result of not citing the husband in error, and of not making him a party to the writ in any manner or form, Mrs Josephine A. Livaudais, the only party to said writ, is not properly before this Court.

Again, the husband was one of the parties to the record in the Court below. He ought, according to the settled jurisprudence of this Court, to have been made a party here.

We therefore submit that this writ of error must be dismissed.

Respectfully,

EDGAR H. FARRAR,

ERNEST B. KRUTTSCHNITT,

Counsel for Defendant in Error.

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"Should her husband be absent, the plaintiff must demand that she be authorized by the Judge before whom the suit is brought to defend it alone.

"Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the Judge being required."

A verdict and judgment was rendered against the plaintiff, who thereupon sued out a writ of error to this Court, to which writ the wife alone is made a party. She alone is named in the writ as the party defendant. She alone was cited in error, and she alone is named in the bond given to perfect the writ of error.

The present motion was heretofore made in this cause to dismiss the writ of error herein contained; but as the record was not then printed, this Court denied the same, with leave to the mover to renew it. After this order was entered by this Court, the plaintiff in error appeared in the United States Circuit Court for the Eastern District of Louisiana and presented to that Court a petition asking leave to cite, Charles Lafitte, the husband of the defendant. This petition was *ex parte* and without any notice to opposite counsel.

The citation in error was issued, directed to Charles Lafitte, was served upon him, and the plaintiff in error has brought a copy of that petition and citation and filed same in this Court, asking leave to make the same a part of the record herein, which motion the Court did not allow.

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As the result of not citing the husband, in error, and of not making him a party to the writ in any manner or form, Mrs. Josephine A. Livaudais, the only party to said writ, is not properly before this Court.

Again, the husband was one of the parties to the record in the Court below. He ought, according to the settled jurisprudence of this Court, to have been made a party here.

The citation of the husband under the circumstances mentioned above in the statement of the case, cannot avail the plaintiff in error. It requires something more